Supreme Court, U.S.
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IN THE

Supreme Court of the United States

MOUNTAIN AMERICA, LLC, *et al.*,

Petitioners,

v.

DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a taxpayer's objection on Equal Protection grounds, to its arguably excessive *ad valorem* property tax assessment, may be defeated by a separate neighborhood designation which is based exclusively on recent market pricing differences with otherwise comparable properties?

2. Whether a taxpayer's objection on Equal Protection grounds, to its arguably excessive *ad valorem* tax assessment based on the recent prices paid for neighboring properties, though supported by proof of its property's comparability to other, much lower assessed properties, inherently fails due to the absence of a separate appraisal of the taxpayer's property?

3. Whether a taxpayer's objection on Equal Protection grounds, to the arguably excessive *ad valorem* tax assessment of its property relative to the assessments of other comparable properties, may be defeated by the contention that the systematic annual underassessment of the other properties occurred over several years prior to the taxpayer's acquisition of its property and, thus, did not preclude prospective seasonal cure of the disparity?

4. Whether the institutional interest of the county commission in the fiscal affairs of the county, as it considered the merits of the petitioners' objections to their *ad valorem* property tax assessments, constituted a facial violation of their rights to Due Process?

5. Whether the personal pecuniary interest of the individual members of the county commission, in the outcome of its review of the petitioners' objections to their *ad valorem* property tax assessments, violated the petitioners' rights to Due Process?

6. Whether the cumulative effect of the process by which the petitioners were required to challenge their *ad valorem* property tax assessments, as administered by the assessor and the county commission and as construed by the courts below, constituted a violation of the petitioners' rights to Due Process?

PARTIES TO PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

1) A list of all parties in the lower court whose judgment is the subject of this petition is as follows:

Petitioners:

Mountain America, LLC; Feroz Alloo; Robert and Beverly Amico; William Andrews; William and Nancy Atkins; Sergio and Cheryl Baez; Thanos Basdekis; Edward and Tracy Bober; Peter Calderon; Jimmy Carroll; Chris and Dina Cashwell; Bob and Linda Chamberland; Wayne Clibum; Peter and Sherry DelCloppo; John Eagle; Dale and Michelle Enzor; Charles and Cynthia Evans; William Farley; Lon Fountain; Esther Halperin; Jonathan Halperin; Stan and Donna Hardman; Mike and Vivian Hollandsworth; Jan Jerge; Carlos and Cindy Kinsey; Freda Livesay; Victor Long; Jim and Shayna Mackey; William and Carol Matthews; Jean Jacques Millard; Matthew Myers; Forest and Carol Newman; Stephen and Lauren Rice; Michael Robey; Hee Soo Roh; George Ross; Robert Schlossberg; Neil Patrick Welsh; Obie Woods, Jr.; Gulam Younossi, Salvatore Zambri; WBMA LLC; Walnut Ridge LLC; Sugar Tree, LLC; JF Investment Holdings; and Greentree LLC

Respondents:

Donna Huffman, Assessor of Monroe County;
and
The Monroe County Commission, Donald Evans, Clerk, and Monroe County Commission Sitting as the 2007 Board of Equalization and Review

2) With respect to corporate disclosure, Mountain America, LLC is the majority member for all limited liability companies listed above. No other petitioner named herein has a parent corporation. Further, no publicly held corporation has a 10% or greater ownership interest in any of the petitioners named herein.

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Mountain America, LLC, et al ("the petitioners") respectfully petition for a Writ of Certiorari to review the opinion and judgment of the West Virginia Supreme Court of Appeals.

OPINIONS BELOW

The published opinion of the West Virginia Supreme Court of Appeals, dated November 25, 2009, is officially reported at Mountain America, LLC v. Huffman, —S.E.2d, 2009 WL 4110951 (W. Va. Nov. 25, 2009) (NO. 34426), and is reproduced at Appendix A.

The Order of the Circuit Court of Monroe County, West Virginia, entered January 28, 2008, is unpublished but is reproduced at Appendix B.

The Order issued by the County Commission of Monroe County, West Virginia, dated February 15, 2007, is unpublished but is reproduced at Appendix C.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the United States Constitution, U.S. Const., Amend V, reprinted at Pet. App. E1, the Equal Protection Clause of the United States Constitution, U.S. Const. Amend XIV, §1, reprinted at Pet. App. E2 and W. Va. Code § 11-3-24 governing Review and Equalization by County Commissions, reprinted at Pet. App. E3.

STATEMENT OF THE CASE

The petitioners respectfully seek this Court's review of the decision and final order of the West Virginia Supreme Court of Appeals (the "court below") issued on November 25, 2009. See, Appendix A, *infra.* In its order, the court below affirmed an order of the Circuit Court of Monroe County, West Virginia (the "circuit court"), entered on January 25, 2008. See, Appendix B, *infra.* The circuit court's order denied the petitioners' petition for appeal from certain *ad valorem* property tax assessments initially proposed by the Assessor of Monroe County, West Virginia (the "assessor") and upheld in an order issued by the County Commission of Monroe County, West Virginia (the "county commission"). See, Appendix C, *infra.*

The petitioners are Mountain America, LLC ("Mountain America"), along with several dozen individuals, who own lots and undeveloped residue in an the area of Monroe County, West Virginia, designated as the Walnut Springs Mountain Reserve ("Walnut Springs") and being developed by Mountain America, and five (5) other related entities.

Walnut Springs consists of several parcels, containing together approximately one thousand (1,000) acres, which were acquired over the last several years by Mountain America and its related entities with the general intent to develop it for residences and related amenities. Walnut Springs was, as of July 1, 2006 (the statutory status date for assessment of 2007 *ad valorem* property taxes in West Virginia), and still remains, in the initial stages of development, but, subject

to a recovery of the residential real estate market, its developers have plans to provide buried utilities, a private road system and other amenities, in addition to a rural community living environment, throughout the property.

The developed lots are subject to uniform restrictions and covenants recorded in the Monroe County land records.. February 7, 2007, Hearing Transcript [hereinafter, "Tr."] p. 101; Assessor's Exhibit [hereinafter, "Assr's Ex."] 10. The restrictions and covenants are recited in the deeds for individual lots which have been conveyed by Mountain America and the other entities to the other petitioners. E.g. Assr's Exs. 1, 3. Those restrictions reflect an intent to provide for primarily residential uses, but they do give the developer the discretion to permit other uses. Neither Mountain America, nor any other entity or person developing Walnut Springs, has recorded a separate development plat or designation of land use. Tr. pp. 97-98.

Between July 1, 2006 and January 31, 2007, the assessor and her staff were engaged in the process of determining taxable values of property in Monroe County. As part of that process, the assessor undertook the valuation of real properties owned by the petitioners in Walnut Springs. In doing so, a determination was made either independently by the assessor, or by her in consultation with the West Virginia State Tax Department (the "Tax Department"), to treat Walnut Springs as an entirely new "neighborhood" for tax assessment purposes. Tr., pp 96-97. To the extent that the assessor understood the geographic scope of Walnuts Springs, consisting of both the sold lots and the undivided residue, the neighborhood she created included only Walnut Springs and excluded contiguous properties. Tr. pp.114-117.

While the assessor was creating a new neighborhood for Walnut Springs, and for at least ten (10) years prior to that time, her office had been cited by the Tax Department for many deficiencies in its annual valuation and assessment work. Tr., pp. 70-80. Specifically, the assessor's office had failed several appraisal study tests conducted by the Tax Department pursuant to the latter's oversight responsibilities. Assr's Exs 6-8; Petitioners' Exhibits [hereinafter, "Ptrs' Exs."] 15 -17. Those tests were designed to reflect, in the aggregate, a general measure of compliance within permitted deviations between the assessor's land book values and actual market values for the relevant periods. Moreover, the preliminary reports of the results of those tests for September and December of 2006, reflected a continuing failure by the assessor on nearly every test conducted by the Tax Department. Assr's Exs. 7-8, Ptrs' Exs. 15-17.

At the same time in 2007, due to the assessor's failure to update the taxable values of other real property in the immediate vicinity of Walnut Springs, a significant deviation resulted between the percentage of fair market value at which the taxable values of the petitioners' properties were set as compared to the taxable values of those nearby parcels and most other real property in Monroe County. Tr., pp. 13-19, Ptrs' Exs. 4-9.

Thus, the assessor set the tax assessments (i.e. taxable values based on 60% of appraised fair market value) of the property of Mountain America at the total amount of Four Hundred Thirty Six Thousand Nine Hundred Eighty Dollars ($436,980) and the total amount of the assessments of the other petitioners' properties at Nine Million One Hundred Sixty Seven Thousand One Hundred Sixty

Dollars ($9,167,160). In January, 2007, notices of their respective assessments were mailed to the petitioners, most of whom lived outside of West Virginia. At the end of that same month, the assessor delivered to the county commission her property books containing the proposed tax assessments of all property in Monroe County.

Upon learning of the taxable values determined by the assessor for their respective properties, the petitioners filed, on a timely basis, with the county commission their applications for review of, and relief from, their assessments A hearing of most of the petitioners' applications for relief was held before the county commission on February 7, 2007 (the "hearing"). At the hearing, the petitioners argued and presented evidence in support of their contention that their assessments violated their rights under the "equal and uniform" taxation provision of the Constitution of West Virginia and under the Equal Protection Clause of the United States Constitution.

At the hearing, it was revealed that the similar and contiguous, or closely proximate, properties just outside the confines of the newly created Walnut Springs neighborhood had taxable values set for them by the assessor which were, on average, $606 per acre, as compared to the taxable value she set for the residue of the petitioners' properties in Walnut Springs at $5,400 per acre. Tr., pp. 16-17, 31-32; Ptrs' Ex. 8.

The testimony of the petitioners' appraiser, and the related exhibits, further showed a large difference between the values urged by the assessor for the properties of the Walnut Springs lot owners which were,

on average, in a range between $26,000 to $30,000 per acre, when compared to the values she would set for the lots in a more established residential neighborhood in Monroe County. Tr., pp. 17-20, 32-34, 38-39; Ptrs' Exs. 9 and 11.

Specifically, Longview Estates is a subdivision of residential lots in Monroe County that has relatively more completely developed infrastructure, water, sewer, roads, etc. than Walnut Springs. However, a detailed sampling of the Longview Estates lots reflects that the values in the 2007 land books proposed by the assessor for them were at an average of $2,640.50 per acre. Tr., pp. 17-18, 37-40.

Further, the petitioners' appraiser, on the basis of his review of recent sales prices of property in Monroe County gleaned from its public records, found that, for the several dozen parcels of the petitioners' properties in Walnut Springs, the assessor's values ranged from a low of 15% of recent sales prices to a high of 438% of recent sales prices, with an average value, proposed by the assessor, of 152% of their documented recent sales prices. Tr., pp. 13-14; Ptrs' Ex. 4. However, based on a random sample of 113 sales, between July 1, 2004 and June 30, 2006, of other parcels elsewhere in Monroe County (also from the public records), it was determined that the 2007 values for those other properties, proposed by the assessor were, on average, only 38.15% of their recent sales prices. Tr., pp. 14-15; Ptrs' Ex. 5.

Another sample of several dozen properties in Monroe County outside of Walnut Springs, that were sold subsequent to July 1, 2006, were assigned taxable

values by the assessor which were, on average, only 47.13% of their recent sales prices. Tr, p.15; Ptrs' Ex. 6. Additionally, there were six (6) properties in the sample whose taxable values, as set by the assessor, were less than eight percent (8%) of their recent sales price and averaged only 5.42% of their sale prices. Tr., p. 15; Ptrs' Ex. 7.

Overall, for 2007 taxes, there was an aggregate increase in the taxable values of *all* lands in Monroe County of $29,591,216.00. Of that amount, $10,908,366.00, or 36.86%, was solely attributable to increases of the proposed taxable values of the petitioners' properties set by the assessor. Tr. p. 19; Ptrs' Exs. 10-11. At the same time, the property in Walnut Springs represents only one half of one percent (0.5%) of the land area of Monroe County. Tr., pp 14, 19.

Also, at the hearing, when asked about the tests undertaken by the Tax Department to measure fairness and equality of the Monroe County land books, the assessor could not identify the types of tests, how they worked, the names of the tests or how they measured equality or fairness of the property tax values she had set. Tr, pp. 71-78. Rather, the assessor stated that her failure to comply with the Tax Department tests was due to the recent sales of properties in Walnut Springs and that across-the-board increases she was making would correct these deficiencies. Tr., pp. 95-96, 111-116. Previously, however, she acknowledged that the longstanding undervaluation of real property in Monroe County predated the sales activity that occurred in Walnut Springs. Tr., pp-77-80. Nevertheless, the subsequent sales/assessment ratio studies conducted by

the Tax Department, which included the assessor's 2007 valuations for Walnut Springs, revealed continuing non-compliance with those tests.[1]

The assessor was unclear about what uses the restrictive covenants applicable to the petitioners' properties permitted or did not permit. Ultimately, she did recognize that the covenants did not preclude the development of the unsold residue of Walnut Springs as commercial property. Tr., pp. 78-81, 107-111. At the same time, in setting its value, she made a determination that the residue should be valued as residential property since she believed that was its "proposed use." Tr. pp 79-80. At the same time, the assessor had not adjusted the taxable value of other commercial land in Monroe County in the current or recent years because she said she did not have adequate sales data to do so. Tr., pp. 78-81.

After the hearing, the county commission voted unanimously to sustain all of the petitioners' assessments. A written notice of the county commission's order, dated February 15, 2007, was mailed

1. The Petitioners note that the cited June 4, 2007 report is not part of the official hearing record in this matter since it did not exist prior to the date of the filing of their appeal to the circuit court. However, it is a judicially noticeable fact and public record which was made relevant by the assessor's above explanation of her actions, and which reveals the continued non-compliance of her office as to this State-monitored sales ratio equality standard. Further, the petitioners appealed their 2008 property tax assessments, and reports of the sales/assessment ratio studies conducted in 2008 show continued non-compliance by the assessor.

to the petitioners' counsel. See, Appendix C, *infra*. The county commission's decision indicated that it was based solely on the otherwise unexplained finding that the assessor's methods of appraisal were pursuant to West Virginia Law. Id.

On March 14, 2007, the petitioners filed their petition for appeal in the circuit court seeking review of the county commission's order. Concurrently, and as a legally integral part of their petition, a certified and complete record of the proceedings before the county commission was filed with the circuit court. On March 28, 2007, counsel for the county commission filed a response opposing the petitioners' appeal and on April 13, 2007, counsel for the assessor filed a separate response to the appeal.

Thereafter, following the presentation of briefs and argument, by its order entered January 25, 2008, the circuit court sustained the assessments. Whereupon, on May 27, 2008, the petitioners petitioned the court below for review of the circuit court's order. Upon that review, the court below affirmed the order of the circuit court. [2]

[2] Pursuant to the Court's Rule 14.1(g)(i), because they are relatively voluminous, the citations and quotations from the record, showing the manner in which the federal questions presented here were raised by the petitioners and passed on by the state courts below, are set forth in Appendix D, *infra*.

REASONS FOR GRANTING THE PETITION

The Court should intervene in this matter to preclude the erosion of its prior mandates: (1) recognizing the role of Equal Protection rights in the context of *ad valorem* property taxation and (2) protecting Due Process rights when the exercise of adjudicatory authority is contaminated by official or personal conflicts of interest and other prejudicial arrangements. Specifically, in its opinion, the lower court qualified the application of this Court's *unanimous* holding in *Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, W. Va.*, 488 U.S 336, (1989), that a West Virginia county's systematic and long-existing underassessment of comparable properties violates the Equal Protection rights of adversely affected taxpayers. Likewise, the opinion of the court below restricted the effect of this Court's holdings in *Ward v. Village of Monroeville, Ohio* 409 U.S. 57 (1972) and *Tumey v. State of Ohio*, 273 U.S. 510 (1927), that actual official bias, much less the strong appearance of personal bias, of adjudicating officials violates a litigant's right to Due Process.

I. A taxpayer's objection on Equal Protection grounds, to its arguably excessive *ad valorem* property tax assessment, may not be defeated by the use of a separate neighborhood designation which is based exclusively on recent market pricing differences with otherwise comparable properties.

The court below held that the assessor's designation of the petitioners' properties as a new, separate neighborhood justified her disparate treatment of them for tax assessment purposes.[3] In so holding, the court below concluded that the assessor followed the guidance of West Virginia Tax Department officials, and followed its Administrative Notice 2006-16 (the Notice). Administrative Notice 2006-16, (W. Va. State Tax Dept. January 31, 2006). However, there is nothing in the assessor's testimony that refers to the Notice, or that reflects her awareness, much less understanding, of it or of her applying it in a uniform manner to other comparable neighborhoods in Monroe County. Tr., pp. 119-122.

Specifically, the Notice provides that "[t]he local assessor divides his or her county into 'neighborhoods' giving consideration to similarities such as parcel size, roads, topography, costs, type and quality of improvements *for land pricing*." Id. (Emphasis added). In addition, the Notice defines a "neighborhood" as

3. The official opinion of the court below in *Mountain America, et al. v Donna Huffman, Assessor of Monroe County*, No. 34426, __ W.Va. ___, ___ S.E.2d ___, 2009 WL 4110951 (W. Va. 25, 2009) (No. 34426), at page 34 (hereinafter, Opin., p. ___). See, Appendix A, *infra*.

being "a geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends and housing characteristics." Id. Here, the assessor's determination, that the petitioners' properties should be separated from all others in the county, violates the cited requirements in a number of ways.

First, she did not include in the new neighborhood identical contiguous or proximate properties with similar parcel sizes, roads, topography, etc. Tr., pp 116-117. Specifically, the testimony of the petitioners' appraiser and Petitioners' Exhibit 8 identify dozens of such properties. Tr., pp. 16-18, 31-33, 39-40. However, the assessor admitted in her own testimony that those excluded nearby properties basically had the same physical characteristics and limited development status as those in Walnut Springs. Tr., p.117. In addition, those other properties were similarly devoid of actually constructed dwellings on them as was most of Walnut Springs.

Second, the *only* rationale the assessor offered, for designating the petitioners' properties as a separate neighborhood, were the relatively higher prices for which they had been recently transferred – the classic "welcome stranger" approach that this Court *unanimously* rejected in *Allegheny Pittsburgh*.[4]

4. As in *Allegheny Pittsburgh*, this case presents an example of the "welcome stranger" assessment practice whereby newly arriving purchasers of property are taxed on the basis of the recent, typically higher prices they pay, while the taxes on long-held and unsold properties of others remain as they have, for extended periods, based on the lower market prices applicable when they were acquired.

Specifically, at the hearing the assessor was asked "[w]hy did you decide that [Walnut Springs] is the neighborhood, as opposed to some larger geographic area?" Tr., p. 116. The assessor's response was: "Because this is the only area that sold as high as they have in our county. Nothing else in our county is selling like this, so I had to." Id. Indeed, despite its ruling on purely procedural grounds, that the owners of the lots in Walnut Springs had not perfected their appeals to the circuit court, the court below readily acknowledged the fact, if not the legal significance, of such disparities in taxation. Opin., p. 39.

Thus, instead of properly applying the neighborhood designation procedures requiring comparisons of the various land features and improvements factors, as directed by the Notice, all for the purpose of determining land prices, the assessor, oppositely, used nothing but land prices to determine the new neighborhood. As a result, the assessments she set for the individual sold lots in Walnut Springs were ten (10) times higher per acre than the assessments she set for the lots in the comparable residential subdivision and the assessments she set for the unsold, undivided residue of Walnut Springs were nine (9) times higher per acre than the assessments she set for the comparable neighboring property.

Nevertheless, the court below would justify such disparate treatment of Walnut Springs, not on the comparability with other properties in the county based on actual current land features and similarly limited improvements, but on the grounds that: (1) the other properties, adjacent to Walnut Springs, always sold for

much less, and (2) amenities existing at Walnut Springs distinguished its properties from others in the county. Opin., p. 39. The former, while factually accurate, begs the central question at issue here, to-wit: whether, notwithstanding their recent pricing disparities, the properties inside and outside of Walnut Springs are intrinsically comparable so as to mandate the imposition of relatively equal tax burdens.

As to the purported amenities, the record is clear that no such distinguishing features existed over the greatest portion of Walnut Springs. Tr., p. 117. Rather, for the most part, such amenities were merely on Mountain America's drawing board for future installation. As such, the mere future prospect of such improvements, understandably "touted" by Mountain America, as the court below wrote, does not, as a matter of law, justify any consideration of them in setting current tax assessments.

Specifically, W.Va. Code § 11-3-1b(c) expressly prohibits the assessor from considering or using a proposed future use of a property to determine its value for current tax purposes. Likewise, the Tax Department's legislative regulations, applicable to these matters, unambiguously direct that "[p]roposed land use may not be used as a basis for valuation until the actual use has changed to correspond with the proposed use." 110 Code of State Regulations, Series 4, § 5.1. Thus, in establishing a separate new neighborhood only for the petitioners' properties, the assessor failed to follow official procedures established for such purposes, and, instead, singled them out for much heavier taxation than that imposed on comparable properties.

Moreover, in approving the assessor's abuse of her authority to segregate the Walnut Springs properties into a separate neighborhood, the court below relied on non-existent physical differences between the Walnut Springs lots and residue, on the one hand, and the comparable properties, on the other. On that basis, and its view that recent higher prices alone required Walnut Springs to bear a heavier tax burden than otherwise comparable properties, the court below endorsed such discriminatory treatment. Opin., pp. 34-36. If the use of such a device, and such circular reasoning, to defeat Equal Protection rights is to be avoided, the ruling of the court below should be reviewed.

II. A taxpayer's objection on Equal Protection grounds, to its arguably excessive ad valorem tax assessment based on the recent prices paid for neighboring properties, though supported by proof of its property's comparability to other, much lower assessed properties, does not inherently fail due to the absence of a separate appraisal of the taxpayer's property.

That, the recent, arms-length prices paid for properties are compelling indicators of their current values, is beyond dispute. Such data is also the primary metric employed to estimate the values of comparable adjacent properties. Thus, in determining the taxable value of Mountain America's residual property, and of the lot owners' properties in Walnut Springs, the assessor referred to the relatively recent arms-length prices paid for the latter. Tr., pp. 84-85, 120-121. However, in rejecting Mountain America's Equal Protection claim challenging that taxable value, the court

below emphasized the failure to present evidence of its properties' current values. Opin., p. 33.

It is apparent from the record that, to determine the per acre taxable values she set for Mountain America's residual property, the assessor used the average price per acre the other Walnut Spring lot owners paid for their properties between July 1, 2005 and June 30, 2006, and discounted it, through a computer program, to reflect its status as undivided residue. Tr., 120-121. That fact, the mathematical objectivity of which the petitioner has never disputed, belies any contention that the current value of Mountain America's property was not proven or was a disputed issue in this case.

Furthermore, in the context of the petitioner's Equal Protection claim, an equally critical fact is that the taxable values set by the assessor for Mountain America's undeveloped residue property was nine (9) times the assessed values of adjacent and comparable properties of others. Tr., pp. 16-18, 31-32; Ptrs' Ex. 8. The evidence also showed that the Walnut Springs lots sold to the other petitioners were comparable in terms of all meaningful physical and geographic characteristics to the lots in another residential subdivision in the county the latter of which were, likewise, taxed on values set by the assessor that were one-tenth (1/10) of the values on which taxation of the Walnut Springs lots was based. Tr., pp. 17-18, 32-33; Ptrs' Ex. 9.

Such proof speaks directly to the central issues presented here because, as this Court recognized in *Allegheny Pittsburgh*, Equal Protection challenges to

ad valorem property tax assessments call for a comparative analysis. Specifically, there this Court ruled that: "[v]iewed in isolation, the assessments for the petitioners' property may fully comply with West Virginia law. But the fairness of one's allocable share of the total property tax burden can only be meaningfully evaluated by comparison with the share of others similarly situated relative to their property holdings." *Allegheny* Pittsburgh, 488 U.S. 336, 346 (1989).

Thus, the ultimate issue under Equal Protection involves not so much the correct current value of the taxpayer's property, standing in isolation, but more concerns the amount of tax burden that property bears in relation to comparable property in the same jurisdiction. To be certain, the comparability of the various properties cited in this case, though based on the factors discussed above (e.g. location, typography, etc.) has been expressed in terms of a value per acre – based on recent prices paid per acre. It is precisely when relative tax burdens do not reasonably reflect such value comparisons that discriminatory taxation is shown.

Clearly, when the recent prices of the other Walnut Springs lots, on which such a separate appraisal of Mountain America's property would be based, were, in fact, the basis of the assessor's determination of its assessed value, such a separate appraisal would have added nothing to the consideration of the issues presented to the court below. Nor would it have made a difference in the proof, much less the legal significance, of the fact that the assessor set taxable values for the Walnut Springs properties which were, on average, based on 152% of those recent prices, while the taxable

values she set for the large samples of other property recently sold in Monroe County were between only 38% and 47% of their recent selling prices.

Thus, given the evidence in the record of all such facts, including the assessor's use of the recent prices paid for the lots in Walnut Springs to set the taxable values of Mountain America's properties, the absence of an additional current appraisal of those properties, cannot, *per se*, defeat its claim that such taxable values violate its Equal Protection rights. To honor such rights, as recognized by this Court in *Allegheny Pittsburgh*, the ruling of the court below to the contrary should be reviewed.

III. A taxpayer's objection on Equal Protection grounds, to the arguably excessive ad valorem tax assessment of its property relative to the assessments of other comparable properties, may not be defeated by the contention that the systematic annual underassessment of the other properties occurred over several years prior to the taxpayer's acquisition of its property and, thus, did not preclude prospective seasonal cure of such disparity.

In distinguishing this Court's mandate in *Allegheny Pittsburgh* from the instant matter, the court below emphasized that, unlike the taxpayers in that earlier case, petitioners had recently purchased their respective properties and, thus, had not already suffered the same decade-long discrimination proven in *Allegheny Pittsburgh*. Opin., pp. 39-41. In so ruling, the

court below reasoned that, because the pattern of underassessment of the properties of others by the assessor had not prejudiced the instant taxpayers over long enough a period, the theoretical prospect of future relief from such discrimination was sufficient to preclude their right to current relief. Id. Thus, the court below reasoned, given the timing of the onset of the discrimination against the taxpayers, the prospect of a near term cure of such discrimination was sufficient to address their complaint. Id.

Such an approach is at odds with the fundamental principles of Equal Protection as applied to *ad valorem* taxation. It also flies in the face of the evidence in the record before the court below that: (1) due to the treatment of Mountain America's residue as vacant, unimproved residential property for tax rate classification purposes, no attempt was being made to cure, seasonally or otherwise, any disparity between its assessment and that of other property falling in the same tax rate classification[5] (see, Tr., pp. 78-80, 101-102, 112); and (2) even on a compound basis, the rate of the assessor's upward across-the-board adjustment of other residential lots would take far more than ten (10) years

5. Although the assessor, based on her conclusion that the anticipated use of the residue of Walnut Springs was residential, treated it as such for valuation purposes, she acknowledged that, under West Virginia law, as vacant and unimproved property, it would not enjoy the more favorable class II tax rate classification, but would, instead, be taxed in the higher class III tax rate classification also applicable to commercial property. See, W.Va. Const., Art. X, § 1.

to equalize their tax assessments with those of the Walnut Springs lots.[6]

Clearly, temporary or occasional disparities in the equalization of property tax assessments among comparable properties are constitutionally tolerable and do not support Equal Protection claims by those shown to be only so briefly overtaxed. *Allegheny Pittsburgh*, at 343-344. However, as this Court also held, ten (10) or more years of such disparities become intentional and systematic – and cannot be excused as temporary or subject to seasonal cure. *Allegheny Pittsburgh*, 488 U.S. at 344.

Thus, in *Allegheny Pittsburgh*, it was the persistent, decade-long and unbroken pattern of discriminatory taxation against at least three (3) different taxpayers in Webster County which led to this Court's unanimous reversal of the lower court. If which of those taxpayer(s) were entitled to relief turned on how long they had suffered discrimination, as the reasoning of the court below would indicate, only one of the three – Allegheny Pittsburgh Coal Company – would have enjoyed such relief because only it had owned its properties for more than ten years before the circuit court there acted.

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6. Based on the average of the across-the-board annual increases the assessor said she had used for two years (6% in one year and 15% in the next) to gradually raise the assessments of other properties (see, Trans., pp. 112-115), it would take well more than 10 years to bring those properties to the same level of assessment as the petitioners' properties. E.g. if that average were 11%, and the ratio of disparity is only 3 to 1 (instead of the 10 to 1 disparity shown here), it would take 10 years for 11% compound annual growth in the value of an amount for it to triple in value.

Since each of the three complaining taxpayers in *Allegheny Pittsburgh* had, from the first year they experienced such discriminatory assessments, challenged them, it cannot be the case that only because no seasonal cure for such discrimination materialized in later years, were they granted relief for all years – including the initial years – when, under the view of the court below, seasonal relief would still have been a theoretical prospect.

Thus, one cannot read this Court's holding in *Allegheny Pittsburgh* to mean that the seasonal cure doctrine's pragmatic moderation of Equal Protection rights is intended to protect the assessor's long-standing "welcome stranger" assessment practice from immediate constitutional scrutiny on the theoretical possibility that it will be corrected in time to effect a seasonal cure.

Accordingly, it is clear that the relative undervaluation of comparable properties in Monroe County over more than a decade denied Mountain America and the other Walnut Springs lot owners the equal protection of law – even in the later years of that decade when those petitioners first acquired their properties and were, instead, assessed on the basis of the much higher prices they paid. To vindicate this Court's holding in *Allegheny Pittsburgh* to that effect, the ruling of the court below to the contrary should be reviewed.

IV. The institutional interest of the county commission in the fiscal affairs of the county, as it considered the merits of the petitioners' objections to their *ad valorem* property tax assessments, constituted a facial violation of their rights to Due Process.

This Court has recognized that, to secure due process for litigants, "officers acting in a judicial or quasi-judicial capacity are disqualified by their interest in the controversy to be decided is, of course, the general rule." *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927). To satisfy a person's due process right to have his case judged by a neutral tribunal, even the appearance of improper bias in the tribunal must be avoided. *See Offutt v. U.S.*, 348 U.S. 11, 14 (1954).

Moreover, there should be no doubt but that the requirement for an unbiased tribunal applies in civil as well as in criminal matters. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). In civil matters involving taxation, it is certain that, before a person is irrevocably relieved of his money, he must be given notice and a reasonable opportunity for an *impartial* administrative tribunal to hear any objections to such taxation. *See McGregor v. Hogan*, 263 U.S. 234, 237 (1923); *Turner v. Wade*, 254 U.S. 64, 67-68 (1920) (emphasis added).

In *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), this Court was asked to decide whether, absent a personal, pecuniary interest, executive responsibilities for governmental finances alone were enough to

disqualify a mayor from acting in a judicial capacity. Answering affirmatively, this Court held that:

> [p]lainly that "possible temptation" may also exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.' *Ward*, 409 U.S. at 59 (citing *Tumey v. State of Ohio*, 273 U.S. 510 (1927)).

Nevertheless, in West Virginia, the county commission, the primary body concerned with superintendence of a county's fiscal affairs, also reviews taxpayers' objections to their property tax assessments. W.Va. Code §11-3-24. As to such an arrangement, former West Virginia Supreme Court Justice Richard J. Neely observed in his dissent in *Rawl Sales & Processing Co. v. County Commission of Mingo County*, 191 W. Va. 127, 133, 443 S.E. 595, 601 (1994), that:

> The county commission lacks expertise in property evaluation but is extraordinarily knowledgeable about the government's need for money, an ingrained bias that is particularly harmful to non-voting entities. Although someone should review the assessor's property evaluation, assigning this important

> review to the county commission is perhaps not a scheme whose design would prompt nomination for the Nobel Prize in jurisprudence. Indeed, a hearing before a county commission on a tax appeal is probably best described by the old Jewish expression ['[f]rom your mouth to God's ear.']

Id. at 132, 600 (Neely, J., dissenting).

Thus, West Virginia's statutory arrangements for review of property tax assessments are designed so that the reviewing body's institutional fiscal interests are aligned in favor of the assessment being challenged. In response to the due process objections raised by the petitioners, the court below, citing one of its recent holding in *In re Tax Assessments of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2009) [*Woodlands*], held that the county commission's fiscal responsibilities did not create so great a conflict as to violate their rights. Opin., p. 22-23.

On that basis, alone, this Court should review the ruling of the court below. Moreover, as the following subdivision reveals, the bias of the county commission was more than merely "institutional" and was manifested in its actions.

V. The personal pecuniary interest of the individual members of the county commission, in the outcome of its review of the petitioners' objections to their ad valorem property tax assessments, violated the petitioners' rights to Due Process.

In *Woodlands*, the court below ruled that only a direct pecuniary interest by the members of the county commission – apparently personal instead of official in nature – could sustain a taxpayer's due process claim based on their conflict of interest. *Id.* In so doing, the court below chose to disregard the direct, pecuniary interest the county commissioners have in the outcome of property tax assessment challenges by virtue of the express terms of West Virginia's statutes setting the compensation for those officials.

Specifically, the West Virginia legislature found that there should be "a direct correlation" between the amount of the assessed value of property in a county and the amount of the compensation to be paid its various elected officials, including county commissioners. W.Va. Code § 7-7-1. Thus, the legislature established a sliding scale of statutory compensation for county officials that rises in amount as the assessed valuation of the property in the county increases. W.Va. Code §§ 7-7-3 and 7-7-4. Moreover, as the evidence in this case indicates, by virtue of those statutory provisions, the salaries authorized for the members of the county commission, did, in fact, increase – in large measure because of the substantially increased assessments they sustained against the petitioners. *See*, Tr., p. 19; Ptrs' Ex. 11.

For the year in question, the total gross assessed valuation of all property in Monroe County, including land, improvements and personal property, increased more than $30 million over that total for the preceding tax year.[7] Under the compensation scheme, the result of that increase, more than one-third of which being attributable to Walnut Springs, was that Monroe County moved from compensation classification 9 to classification 8. W.Va. Code § 7-7-3.

Thus, as a result of their actions in upholding the assessed values set by the assessor for 2007 taxes, each of the members of the county commission became entitled to salary increases for their part-time positions. Specifically, for 2006, the statutory salary for the part-time position of a county commissioner in a Class 9 County was $ 24,420, while the salary for a county commissioner in a Class 8 County was $25,080, a difference of $660. W.Va. Code §7-7-4(e)(5).

Nevertheless, when confronted with such law and facts, the court below determined it need not address the apparent conflict because: (1) it had otherwise concluded that, substantively, the assessor's valuations of the petitioners' property were not excessive and (2) it questioned the substantiality of the conflict. Opin., p. 27. To determine, at the least, whether such a substantiality exception to this Court's rulings about disqualifying conflicts of interest should be recognized, the ruling of the court below should be reviewed.

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7. See, Ptrs' Ex. 13 and *2006 Monroe County Real and Personal Property Books*, a judicially noticeable public record.

In considering whether this case presents a situation whereby, the circumstances of the personal pecuniary interest of the members of the county commission, in ruling against the petitioners' objections, violates the petitioners' due process rights, this Court should also consider various other prejudicial actions taken by the county commission in reaching that ruling.

First, in West Virginia, county commissions only review property tax assessments during the month of February, thus leaving taxpayers with scarce time to prepare objections to their assessments once notified of them a few weeks earlier. W.Va. Code § 11-3-24. The brevity of such an opportunity for review often is made more acute by the provision of the law which allows the county commission to terminate such reviews as early as the fifteenth (15th) day of February. *Id.*

Because the county commission, in fact, chose to end its consideration of the petitioners' appeals on that earliest possible day, the time allowed to the various petitioners to receive the mailed notice of their assessments, to notify the commission of their desire to appeal, to engage counsel and an appraiser and to prepare evidence to support their objections was even more tightly constrained. Here, the prejudice of that abbreviated time frame was compounded by the fact that many of the petitioners' mailing addresses, listed for purposes of notification, are out-of-state addresses.

Second, even more damaging to the petitioners' due process rights was the county commission's decision to file a response to the petitioners' appeal to the circuit court, notwithstanding that the commission was the

tribunal authorized to determine the merits of the petitioners' claims. Moreover, the substance of the county commission's response, challenging the status of all but one of the petitioners as parties to the appeal, and attempting to rewrite its own order by asserting new grounds for it, evidences a lack of impartiality in its own right. Furthermore, any such subsequent order-embellishing response by the commission to the petitioners' appeal is inappropriate and untimely, since its authority to review assessments ended six (6) weeks earlier. W.Va. Code § 11-3-24. Thus the petitioners' due process rights are further prejudiced, inasmuch as such response, in effect, constitutes an additional ground in support of the assessment to which petitioners have no opportunity to respond with evidence.

Thus the "ingrained bias," recognized by former Justice Neely, *supra.*, was particularly exacerbated here when the county commission, after ruling adversely on the petitioners' cases, insisted that it was a proper party litigant adverse to their appeal of its own ruling.

Finally, under West Virginia law, while reviewing tax assessments, a county commission may propose an increase in *any* property's taxable value beyond that proposed by the assessor, and such increase may be finalized after giving the affected property owner as little as five (5) days prior written notice. W. Va. Code § 11-3-24. In this matter, the county commission exercised that option to raise the tax assessment on the property of Esther Halperin, the 83-year old mother of petitioner and Walnut Springs developer, Jonathan Halperin. Earlier, on January 9, 2007, Ms. Halperin received notice that the assessor set the 2007 taxable value of her

property at $ 6,480, which she found acceptable and did not seek review by the county commission. However, one day after the hearing on the other petitioners' assessments, the commission, issued, without explanation to Ms. Halperin, a new "Notice of Increase in Assessment" for her property raising its taxable value to $ 302,160.

Thus, the questions about prejudice to the petitioners' due process rights raised by the foregoing arrangements indicate the need for this Court's plenary review of the ruling of the court below.

VI. The cumulative effect of the process by which the petitioners were required to challenge their *ad valorem* property tax assessments, as administered by the assessor and the county commission and as construed by the courts below, constituted a violation of the petitioners' rights to Due Process.

When considering the due process adequacy of a particular adjudicatory arrangement, this Court has often applied a three-factor, sliding scale standard in such matters. *See Matthews v. Eldridge*, 424 U.S. 319 (1976). Those factors to be concurrently weighed and balanced are: (1) the nature of the individual interest to be affected by official action; (2) the risk of erroneous deprivation of such interest under current procedures and the efficacy of greater safeguards to reduce such risk; and (3) the government's competing interest in the particular function involved and in avoiding any fiscal or administrative burdens that greater safeguards would likely entail. *See id.* at 335.

Thus, the government's interest in avoiding disruption of its revenue sources (the third *Matthews* factor) must be balanced against the risk of depriving a taxpayer of more in taxes than he rightfully owes (the second *Matthews* factor). In the context of the county commission's review of proposed property tax assessments in West Virginia, the second *Matthews* factor should include the "ingrained bias" of the commission.

Moreover, both on its face and through its practical operation, the West Virginia scheme for review of property tax assessments presents a system which confronts taxpayers with limited notice, with a narrow opportunity to prepare and present objections, with enhanced burdens of proof and standards of judicial review to overcome and with an array of local officials all institutionally interested in maximizing tax assessments.

Specifically, West Virginia law only requires that taxpayers receive notice of increased real property tax assessments within fifteen (15) days before the county commission meets to review any objections to those assessments. W.Va. Code § 11-3-2a. At the same time, the primary grounds for a taxpayer to challenge the proposed taxable value of his property are: (a) that the proposed taxable value is not equalized in relation to the proposed taxable values of other, similar property, (W.Va. Const. Art. X, § 1) and/or (b) that the proposed taxable value is excessive because it exceeds the property's true and actual value. W. Va. Code § 11-3-1

Integral to raising a challenge to a proposed taxable value on either ground is timely access to information about the proposed taxable values and market values of other taxpayers' properties. As a practical matter, given

the short time between notice of increased assessments and the county commission's review of objections, a taxpayer often has only thirty (30) days to obtain copies of the assessor's proposed property books by filing a Freedom of Information Act (FOIA) request and to engage the services of an appraiser to perform a thorough survey of recent comparable property sales.

Many of these costly and inconvenient actions are beyond the means of most individuals and small businesses. Moreover, given the brief period between when a taxpayer receives notice and the time he must present a challenge to that value, there is little practical opportunity to effectively use such data.

This Court has held that "[t]he fundamental requisite of due process of law is the opportunity to be heard . . . [with such hearing] at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) In the present context, such principles of due process require that a taxpayer have timely and adequate notice detailing the reasons for the assessments, and a reasonable opportunity to prepare and present a challenge of the same to an impartial official. Such circumstances have little in common with West Virginia's system for tax assessment review.

Further, under the decisions of the court below, the challenges, facing those seeking review of their assessments before the county commission, are compounded by the imposition of an enhanced burden of proof ("clear and convincing evidence" as opposed to a simple "preponderance of the evidence"). Opin., p.32 To the contrary, this Court has held that in certain circumstances such a higher burden of proof itself may

constitute a denial of due process. *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602 at 617-618 (1992).

Here, however, citing its earlier holding in *Woodlands*, the court below held that imposing the "clear and convincing" burden of proof on taxpayers appearing before the county commission, in their only opportunity to present evidence challenging their property tax assessments, did not rise to a due process violation. Opin., p. 32.

Likewise, an earlier decision of the court below also specifically set forth the relatively high standard, by which a West Virginia circuit court reviews the county commission's decision, to-wit: "whether the challenged property valuation is supported by substantial evidence, . . . or otherwise is in contravention of any regulation, statute, or constitutional provision,." *American Bituminous Power Partners, L.P.*, 208 W.Va. at 250, 254-55, 539 S.E.2d 757, at 761-62 (internal citations omitted).

To the contrary, under the rulings of this Court, the constitutional problem, with having cases heard at the first adjudicatory level by an inherently biased tribunal, is exacerbated when the taxpayer is confronted with a high standard of review upon an appeal of that tribunal's decision. *See Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (citing *Tumey v. State of Ohio*, 273 U.S. 510 (1927)).

Moreover, even if the process for judicial review were more availing, that would not cure the flaws in the initial hearing that should be, but is not, before an impartial tribunal. As this Court has recognized, even an adequate appeal process will not cure the failure to provide a neutral

and detached adjudicator in the first instance. *Concrete Pipe*, 508 U.S. 602 (1993).

The right of taxpayers to obtain judicial review under the West Virginia statute is further constrained in at least two other ways. First, the county commission is not required to even issue a written decision – much less to provide any reasons for it. Second, the brief time to perfect the appeal (complete with the entire record including a transcript), to-wit: thirty (30) days from the adjournment of the commission's hearing – likely discourages many taxpayers from exercising their appeal rights. W.Va. Code § 11-3-25.

Finally, although it is the assessor's proposed assessment of the taxpayer's property that is at issue, during the hearing before the county commission, the statute directs the assessor to "attend and render every assistance possible [to the commission] in connection with such [proposed taxable values]." W.Va. Code § 11-3-24. In effect, a county commission has, in the assessor, a statutorily assigned advocate for its interests in maximizing its revenue, while at the same time the county commission is operating under the legal fiction, indulged by the court below, that it is a neutral judge of the very matter that directly affects its fiscal interests.

Likewise, although the elected county prosecuting attorney is, by law, the general legal counsel to the county commission, (*See* W.Va. Code § 7-4-1), under prior rulings of the court below, in the context of a hearing before a county commission reviewing a taxpayer's objection to his assessment, both the county commission and the assessor are entitled to call on the prosecuting attorney to assist

them at that hearing. *See In re Tax Assessments Against Pocahontas Land Co.*, 172 W. Va. 53, 303 S.E.2d 691 (1983). The duplicity and conflicts inherent in the structured interplay of such multiple roles of the assessor, the prosecuting attorney and the county commission stand in stark contrast to the standard of a neutral hearing that due process contemplates.

Taken collectively, the various prejudicial aspects of the West Virginia's property tax appeals system weigh heavily against the "appearance of justice." *See Louk v. Haynes*, 259 W. Va. 482, 223 S.E.2d 780 (1976) (finding failure of due process because the judge was not impartial and failed to recuse himself). In *Louk*, 259 W.Va. at 500, 223 S.E.2d at 791, the court below quoted a ruling of this Court: to-wit: "to perform its high function in the best way 'justice' must satisfy the *appearance of justice*." *Offutt v. United States*, 348 U.S. 11 (1954); *In re Murchison*, 349 U.S. 133, (1955). (emphasis added)

Thus, even if, taken in isolation, any one of the above-described prejudicial arrangements are not seen, alone, as enough to support a conclusion that the system lacks the appearance of justice, cumulatively, they do. As the court below has otherwise recognized, prejudice may result from the cumulative effect of errors so that the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. *See State v. Walker*, 188 W. Va. 661, 425 S.E.2d 616 (1992), Syl. pt. 5.

For these reasons, in this and every other case under West Virginia's system, taxpayers' rights to due process may be said to have been violated. Thus, the ruling of the court below upholding such system ought to be reviewed by this Court.

CONCLUSION

Grant of certiorari and reversal of the judgment of the court below is necessary to prevent erosion of this Court's mandates recognizing the role of Equal Protection rights in the context of *ad valorem* property taxation and protecting Due Process rights when the exercise of adjudicatory authority is contaminated by official or personal conflicts of interest and other prejudicial arrangements. That this Court's unanimous holding in *Allegheny Pittsburgh*, recognizing the role of Equal Protection rights in such matters, reversed a 1988 ruling of the court below here serves to emphasize the threat of such erosion. Accordingly, for all the reasons stated above, the petitioners pray that this Honorable Court grant this petition for a *writ of certiorari.*

Respectfully submitted,

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APPENDIX A — OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA FILED NOVEMBER 25, 2009

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 34426

MOUNTAIN AMERICA, LLC, ET AL,

Petitioners Below, Appellants,

v.

DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY,

Respondent Below, Appellee.

Appeal from the Circuit Court of Monroe County
The Honorable Robert A. Irons, Judge
Civil Action No. 07-C-30

AFFIRMED

Submitted: September 8, 2009
Filed: November 25, 2009

Benjamin, Chief Justice:

The instant action is before this Court upon the appeal of Mountain America, LLC, and several other individual landowners below [hereinafter "Appellants"]

from a January 28, 2008, order of the Circuit Court of Monroe County denying the Appellants' Petition for Appeal from *Ad Valorem* Property Tax Assessments. Herein, Appellants allege that the circuit court erred in affirming the decision of the Monroe County Commission to uphold the property tax assessments made by the County Assessor, Donna Huffman. Specifically, the Appellants assert that the tax assessments are excessive and unequal as compared to the 2007 tax assessments of the property of other taxpayers in Monroe County, and that the assessments are the result of the Assessor's improper and discriminatory methods in violation of the Appellant's rights to equal and uniform taxation under the West Virginia Constitution and in violation of the Appellant's rights to equal protection of the law under the United States Constitution. In addition, Appellants assert that the process by which they seek review of the assessments before the County Commission violates their rights to due process.

In response, the Assessor alleges that she utilized the correct valuation in determining the "true and actual value" of the residue of property owned by Mountain America, LLC, as prescribed by the West Virginia Legislature and other state regulations, and that the taxpayers failed to present evidence at the Board of Equalization and Review hearing that the Assessor had significantly overvalued their properties. She also asserts that Appellants' constitutional arguments lack merit because this Court has already considered the Appellants' due process and equal protection arguments

on prior occasions and found that the taxpayer appeal process is constitutional. Furthermore, she argues that the circuit court correctly found that the case file did not reflect who the taxpayers were or what specific lots were at issue, thus, the other individual taxpayers did not perfect an appeal.

The Monroe County Commission responds and argues that the raw data provided during the hearing showed that the residue was assessed at a rate which was absolutely reasonable on its face, the taxpayers did not meet their burden to show that the assessment was excessive, and the taxpayers did not submit necessary evidence as to what actually was the "true and actual value" of their property. It also argues that the circuit court correctly refused to consider any of the taxpayers' arguments regarding alleged inherent flaws in the property appeals system, as these issues were beyond the scope of an appeal and thus, more appropriate for an independent action. Likewise, the County Commission also argues that Mountain America was the only petitioner to perfect its right to appeal the County Commission's decision.[1]

This Court has before it the petition for appeal, all matters of record and the briefs and arguments of counsel. For the reasons expressed below, the January 28, 2008, order of the Circuit Court of Monroe County is affirmed.

1 We wish to also acknowledge the Amicus Curiae brief filed by the West Virginia Association of County Officials and appreciate its participation in this proceeding.

Appendix A

I.

FACTUAL AND PROCEDURAL HISTORY

The Appellants are the owners and developer of lots located within Walnut Springs Mountain Reserve [hereinafter "Walnut Springs"] in Monroe County, West Virginia. Walnut Springs is a residential development comprised of approximately 1,000 acres located on Bud Ridge Road near Union, West Virginia. During the last few years, Mountain America, LLC [hereinafter "Mountain America"] and its affiliated entities have undertaken to develop Walnut Springs into a residential housing development with related amenities. Mountain America and its affiliated entities have been selling tracts of property located in Walnut Springs since September 2004. Walnut Springs remains in the early stages of development.

Donna Huffman is the duly elected Assessor of Monroe County. Pursuant to West Virginia Code § 11-3-1(1977) (Repl. Vol. 2008), Ms. Huffman is charged with annually assessing the true and actual value of all property located within Monroe County by July 1. During the period from July 1, 2006, to January 31, 2007, Ms. Huffman and her staff [hereinafter collectively referred to as "the Assessor"] ascertained the true and actual value of all property, real and personal, subject to *ad valorem* property taxation located within the county.[2]

2. For a definition of "true and actual value", see note 25, *infra*.

Appendix A

During the period of July 1, 2005, to June 30, 2006, the purchase price of the unimproved real property sold by Mountain America and its affiliated entities was significantly higher than any other unimproved real property being sold elsewhere in Monroe County. As a result of the higher consideration being paid for the lots located in Walnut Springs, the Assessor, after consulting with the State of West Virginia Department of Revenue, created a new "neighborhood" which contained all of the real property located in the Walnut Springs development.[3] The Assessor undertook the valuation of real properties owned by the Appellants in Walnut Springs, which, on July 1, 2006, included some developed lots and undeveloped residue. In creating the neighborhood, the Assessor considered the following information concerning the real property: parcel size, roads, topography, cost, type, and quality of improvements.[4] In calculating the 2007 real property

3. Pursuant to State Tax Department Administrative Notice 2006-16 (Jan. 31, 2006), a "neighborhood" is defined as a "geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends, and housing characteristics."

4. Walnut Springs is subject to those certain "Amended and Restated Declaration of Covenants, Conditions, Restrictions, Reservations, and Easements for Walnut Springs Mountain Reserve a Residential Home Development Near Union, West Virginia dated April 8, 2005" which is of record in the Office of the Clerk of the Monroe County Commission in Deed Book 242, at Page 398. The restrictive covenants provide that the "lots shall be used for residential and personal

(Cont'd)

assessments for Walnut Springs, the Assessor compiled a list of sales in the development for the period from July 1, 2005, to June 30, 2006. She then calculated the price per acre for each sale which occurred during that time period. Once the price per acre for each sale was calculated, she took the average of all sales during that period. The calculated unit price per acre was $ 29,236.00, a figure significantly higher than any other real property sales in Monroe County.[5]

(Cont'd)
recreation purposes; no business, commercial or professional enterprises which regularly attract customers, patrons, or clients shall be permitted or conducted thereon, except as approved by the Developer." Said restrictions and covenants are recited in the deeds for individual parcels which have been conveyed by Mountain America and the other entities. Based upon the restrictive covenants, the Assessor assessed the residue of Walnut Springs development as undeveloped residential property. For the 2007 tax year, all of the real property owned by Mountain America and its related entities was assessed as "residue," resulting in a lower assessment than would occur if the remaining real property was assessed as individual lots as marketed by the developer.

5. In assessing each property parcel in Walnut Springs, the Assessor verified the property owner's name, address, and the description of the real property. Following each transfer of real property in Monroe County, the Assessor mailed to the purchaser a "Classification and Sales Confirmation Questionnaire" to confirm that the sales price of the property was the actual market value of the real property transferred. In addition, the Assessor visually inspected the real property, determined the property class, recorded the neighborhood code,

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Appendix A

As an accommodation to the landowners, the Assessor attempted to lower the per acre assessment in the neighborhood by striking the two highest sales and the two lowest sales and recalculating the average price per acre. The calculated unit price per acre based on actual sales was $ 28,502. She then entered the neighborhood information into the real estate mass appraisal software (CAMA), and again lowered the assessment per acre to $ 26,900 in a further attempt to lower the tax burden on the landowners.[6] Once all of the information was entered into the CAMA software, the residual property value for the neighborhood was calculated at $ 5,400 per acre, a figure significantly lower than the asking price for such acreage.[7] On or about January 9, 2007,the Appellants were provided a "Notice of Increase of Assessment" of real property for the 2007 tax year. Specifically, the Assessor notified the landowners that the assessed value of their properties

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and determined the infrastructure of the development. Currently, all vacant property in Walnut Springs is assessed as Class III property. Class I property consists of intangibles such as taxable stocks, bonds and promissory notes. Owner-occupied properties used exclusively for residential purposes and farms are Class II property. Property that is not Class I or II property is considered Class III property, if it is located outside of a municipality. If such property is located within a municipality, it is considered Class IV property.

6. The total taxable value for all of the sold lots within Walnut Springs was $ 9,167,160.

7. The undeveloped residential property within Walnut Springs had a total taxable value of $ 436,980.

would increase by at least ten percent from the previous tax year.[8]

On February 7, 2007, the Appellants appeared by counsel before the County Commission sitting as the Board of Equalization and Review in order to protest the 2007 *ad valorem* tax assessments of their properties within Walnut Springs.[9] At the February 7, 2007 hearing, the Appellants claimed that the assessments of their property for the period from July 1, 2006, to January 31, 2007, were excessive and exceeded their true and

8. As prescribed by West Virginia Code § 11-1C-1 (1990)(Repl. Vol. 2008), all real property located in the county is reassessed every three years. Additionally, it is the Assessor's duty to assess all real property at sixty percent of its fair market value. Prior to the election of Ms. Huffman as Assessor, Monroe County had historically assessed some real property in the County at an amount below sixty percent of its fair market value. The Assessor now asserts that, as a result of these prior deficiencies, she submitted a detailed plan of action to correct the deficiencies to the Property Valuation Training and Procedures Committee. In accordance with her plan, the Assessor increased all real property assessments throughout Monroe County by six percent for the 2006 tax year. Further, in accordance with the proposed plan of action, the Assessor increased all real property assessments throughout Monroe County fifteen percent for the 2007 tax year.

9. Although Mountain America took the lead in the case, notices were filed indicating that other individual property owners joined in the challenge. According to Mountain America, the Appellants' counsel and counsel for the County Commission entered into a written stipulation identifying the taxpayers who were challenging the valuation before the County Commission.

actual value.[10] The Appellants offered testimony from their expert general real estate appraiser, Todd Goldman, at the hearing. Mr. Goldman presented a statistical analysis which compared the assessments of properties within Walnut Springs to those of properties located in Monroe County outside of Walnut Springs. Mr. Goldman also compared assessments in the county to recent transactions, and he opined that comparable property in surrounding areas was assessed at lower values. However, he did not appraise any of the Appellant's properties at issue, or any other property which was the subject of his statistical analysis. Furthermore, the Appellants did not present any evidence of what they paid for the property, the listing price for the unsold lots, or other basic information as to the properties at issue. The Assessor testified at the hearing and explained the steps she took in arriving at the assessments. Representatives of the West Virginia

10. The taxpayers asserted that the Assessor's figure ranges from 15% to 438% of the prices that they each paid for their lots, with an average of 152% of what they paid. They argued that for tax year 2007, there was an aggregate increase in the taxable values of all land in Monroe County of $29,591,216 and that 36.86% of the increase was solely attributable to increases in the assessed values of their properties, even though Walnut Springs is just 1% of the taxable land in the county. The taxpayers further asserted that for several years, the County Assessor undervalued properties county-wide and that the State Tax Department performed multiple audits confirming this. The taxpayers argued that they were being singled out for discriminatory treatment because their property was greatly overvalued, while other, similar properties are greatly undervalued.

Department of Tax and Revenue's property tax division were present at the hearing along with their counsel. After considering the testimony and evidence presented at the February 7, 2007, hearing, the County Commission issued an order on February 15, 2007, affirming the assessments on the basis that the methods of appraisal used by the Assessor were within the guidelines provided by law.

On March 14, 2007, Appellants filed a "Petition for Appeal from *Ad Valorem* Property Tax Assessments" in the Circuit Court of Monroe County. The County Commission and the County Assessor both filed responses in opposition to the appeal. On June 6, 2007, the County Commission filed a "Motion to Confirm Mountain America LLC as the Sole Property Owner which has Perfected an Appeal," wherein it asserted that under, West Virginia Code § 11-3-25 (1967)(Repl. Vol. 2008)[11], Mountain America was the only party that had properly perfected an appeal to the circuit court because rather than name each petitioner in the appeal, the circuit court petition only referred to "Mountain America, LLC et al." Thus, the County Commission alleged that the circuit court petition failed to set forth with particularity or otherwise identify by name which property owners, other than Mountain America, filed an appeal with the circuit court. On July 18, 2007, the circuit court entered an order granting the County Commission's motion, reasoning, in part, that:

11. West Virginia Code § 11-3-25 provides that any person claiming to be aggrieved by an assessment must appeal to the circuit court within thirty days of adjournment of the Commission.

> To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question. A review of the record of the hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10. The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal with some particularity in the initial filings in circuit court.

Thus, the circuit court ruled that the matter would proceed with Mountain America as the sole Appellant and that the style of the case should be amended to delete the term "et al."

Following this ruling, the taxpayers then moved to amend their Petition for Appeal seeking permission to argue that by filing a response to their Petition for Appeal, the County Commission demonstrated an inherent bias and conflict of interest, and that the property tax appeals process itself violated their due process rights and was therefore unconstitutional. The circuit court denied permission to amend, finding that the constitutional issues raised were beyond the scope of the original petition and constituted a separate and distinct declaratory action, and thus would be best raised in an independent action since it would prejudice Appellees to allow the mid-appeal amendment.

Subsequently, the circuit court then accepted the briefs on the merits of Mountain America's appeal and heard the oral arguments of counsel. By order entered January 28, 2008, the circuit court affirmed the decision of the County Commission finding that "the Assessor acted in conformity with the statutory authority, state regulations, and case law" and "valued the property appropriately within the guidelines prescribed by the West Virginia Code." The circuit court further found that "the County Commission properly weighed the evidence before it and did not err in its decision to uphold the assessments made by the Assessor." It is from that order that Appellants now appeal.

II.

STANDARD OF REVIEW

The Appellants assign five errors to the circuit court's ruling. Specifically, Appellants allege that the circuit court erred in: (1) affirming the failure of the County Commission to equalize the 2007 taxable values of the taxpayers' properties in violation of mandate of the West Virginia Constitution that taxation must be equal and uniform throughout the state; (2) concluding that the excessive and unequal 2007 tax assessments of the taxpayer's properties were not the result of intentional and systematic under-assessments by the County Assessor of other taxpayers' properties in Monroe County in violation of the taxpayers' constitutional rights to equal protection of the law; (3) concluding that West Virginia's statutory system for

review of property tax assessments did not violate the taxpayers' rights to due process of law; (4) concluding that the particular manner by which the County Commission used the procedures for review of the Taxpayers' property assessments did not violate their rights to due process of law; and (5) in denying the right of all but one of the taxpayers to any judicial review of the decision of the County Commission sustaining the excessive and unequal taxable values of their property.

Given the various assignments of error raised, our standard of review is multifaceted. We have held that "[t]his Court reviews the circuit court's final order and ultimate disposition under an abuse of discretion standard. We review challenges to findings of fact under a clearly erroneous standard; conclusions of law are reviewed *de novo*.' Syllabus Point 4, *Burgess v. Porterfield*, 196 W. Va. 178, 469 S.E.2d 114 (1996)." Syl. Pt. 1, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008). With respect to questions of law raised regarding the constitutionality of the governing statutes, we employ a *de novo* standard of review. *Id.* at __, 155. Furthermore, "'[a]n assessment made by a board of review and equalization and approved by the circuit court will not be reversed when supported by substantial evidence unless plainly wrong.' Syl. Pt. 1, *West Penn Power Co. v. Board of Review and Equalization*, 112 W. Va. 442, 164 S.E. 862 (1932)(other internal citations omitted)." *Id.* at Syl. Pt. 3. Guided by these standards, we proceed to consider the arguments before us.

III.

DISCUSSION

A.

Perfection of Appeal from Board of Equalization and Review to Circuit Court

In order to establish the proper parties to the instant appeal, we will first address the last assignment of error presented by the Appellants, whether the circuit court erred as a matter of law in denying all but one of the taxpayers judicial review of the decision of the County Commission. On July 18, 2007, the circuit court entered an order granting the County Commission's "Motion to Confirm Mountain America LLC as the Sole Property Owner which has Perfected an Appeal," reasoning, in part, that:

> To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question. A review of the record of the hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10. The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal

with some particularity in the initial filings in circuit court.

The circuit court ruled that the matter would proceed with Mountain America as the sole Appellant and ordered that the style of the case should be amended to delete the term "et al."

Herein, Appellants allege that the circuit court erred in granting the County Commission's "Motion to Confirm Mountain America LLC as the Sole Property Owner which has Perfected an Appeal" because numerous taxpayer notices were filed with the County Commission and all of the individually-named taxpayers were clearly identified in a written stipulation in the Commission's record.[12] Additionally, Appellant's allege that at the beginning of the hearing before the County Commission, the taxpayer's counsel presented copies of the Notices of Assessment for each party appealing.

Conversely, the Assessor and the County Commission assert that the circuit court correctly found that the case file did not reflect who the taxpayers were or what lots were at issue because the appeal in the circuit court purported to be filed by "Mountain America, LLC" and "several dozen individuals and entities" was styled "Mountain America, et al." Thus, they contend that no taxpayer other than Mountain America complied with the jurisdictional requirement of filing an appeal

12. In the instant Petition for Appeal, Appellants identify over fifty separate individually-named petitioners.

within thirty days, as required by West Virginia Code § 11-3-25. Additionally, the County Commission argues that the stipulation to which the taxpayers refer is not relevant because it addressed who was a party before the Board of Equalization and Review, not who was a party before the circuit court.

In further response to Appellant's argument, Appellees also allege that the individually-named taxpayers' instant appeal is untimely because the circuit court's July 18, 2007, order granting the County Commission's "Motion to Confirm Mountain America LLC as the Sole Property Owner which has Perfected an Appeal" was a final adjudication on the merits with respect to the other taxpayers. Appellees allege that the order amounted to a judgment on the pleadings pursuant to Rule 12(c) of the *West Virginia Rules of Civil Procedure*, and thus, the other individually-named taxpayers were required to appeal to this Court within four months of the July 18, 2007 order.

In their reply, Appellants assert that the circuit court's order was interlocutory, not final, in nature, and thus, the instant appeal is not untimely. Appellants alternatively allege that if the circuit court's July 18, 2007, order was final in nature, they could still intervene in the appeal given their interest in the issues involved. Appellants cite to *In re Elk Sewell Coal*, 189 W. Va. 3, 427 S.E.2d 238 (1993), for the proposition that there is standing to intervene in a property tax appeal when a relevant issue emerges at the appellate stage.

Appendix A

1. Timeliness of Instant Appeal

In assessing whether the other taxpayers' appeal herein is timely, we find that the circuit court's order entered on July 18, 2007, was in fact interlocutory for purposes of determining whether the other taxpayers were required to appeal the circuit court's decision at that time. "[E]ven if an order as to fewer than all claims or parties is not certified by a circuit court, it may nevertheless be considered final if it approximates a final order in its nature and effect." *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 549, 584 S.E.2d 176, 183 (2003). However, even if a final order as to fewer than all claims or parties was intended, which is not evident, "although the order is immediately appealable upon its entry, appeal need not be taken, but may be taken at any time until the last order terminating the entire action expires." *Id.*

Even though the circuit court's July 18, 2007, order essentially dismisses any claim of the Appellants other than Mountain America and was, thus, in effect, a final adjudication in nature ending litigation on the merits insofar as it related to the interests and claims of such party Appellants other than Mountain America, the circuit court did not expressly direct, as required by Rule 54(b) of the *West Virginia Rules of Civil Procedure*, the entry of a final judgment as to those parties or make an express finding that there was "no just reason for delay." Therefore, while the remaining party Appellants could have, pursuant to *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 584 S.E.2d 176,

appealed the circuit court's decision immediately following entry of the July 18, 2007, order because it dismissed them from the litigation, they were not specifically required to appeal at that time because entry of a Rule 54 final judgment was not expressly directed. Consequently, we find that the instant appeal of those named party Appellants is timely.

2. Particularity of Identification Needed of Those Appealing Assessment

Having determined that the party Appellants are properly before us, we now turn to the issue of whether such Appellants properly perfected an appeal to the circuit court. There is no dispute that Mountain America properly perfected its appeal to the circuit court. However, with respect to the other landowners, we conclude that the circuit court did not err in ruling that such Appellants did not properly perfect an appeal.

West Virginia Code § 11-3-25 provides that:

> Any person claiming to be aggrieved by any assessment in any land or personal property book of any county who shall have appeared and contested the valuation. . . may, at any time up to thirty days after the adjournment of the county court, apply for relief to the circuit court of the county in which such books are made out; . . .

W. Va. Code § 11-3-25. Herein, the petition for appeal filed before the circuit court was purported to be filed

by Mountain America and "several dozen individuals and entities." However, the circuit court petition failed to set forth with particularity or otherwise identify by name which property owners, other than Mountain America were filing an appeal. In determining that Mountain America was the sole property owner which properly perfected its appeal, the circuit court reasoned, in part, that:

> [i]n this matter, neither the initial order, the petition, nor the civil information case sheet reflects the identity of any petitioner other than Mountain America, LLC.
>
> . . .
>
> Rule 10 of the Rules of Civil Procedure requires that "in the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." Rule 20 allows joinder of multiple parties. The Petition filed in this proceeding is silent to the names of the Appellants, other than Mountain America, LLC.
>
> Persuasive authority of a neighboring jurisdiction has held that a petition for appeal which names only one of multiple complainants, appeals only the cause of the complainant named and is "wholly insufficient

as a petition for an appeal by any person other than the person named." Carlton v. Paxton, 14 Va. App. 105, 415 S.E.2d 600, 8 Va. Law Rep. 2405 (Va. App. 1992), *citing* Challice v. Clark, 163 Va. 98, 102, 175 S.E. 770, 770-71 (1934)).

. . .

Under the West Virginia Rules of Civil Procedure, the initial pleading in an appeal from the Board of Equalization must contain the names of the parties. This is necessary so that the court record clearly reflects who is appealing the decision of the Board of Equalization. To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question. A review of the record of the hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10. The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal with some particularity in the initial filings in circuit court. This Court recognizes that the statutory procedure in tax appeals is somewhat archaic, however when the appeal reaches circuit court, it is governed

> by the Rules of Civil Procedure which clearly requires the names of the parties in the initial filing. . .

While we appreciate Appellants' contention that the identity of each and every one of the Appellants had been stated for the record at the outset of the evidentiary hearing before the County Commission, and that the record below contains a stipulation with regard to the taxpayers and tracts of land at issue at the February 7, 2007, hearing before the Board of Equalization and Review, the fact that certain property owners were involved in the February 7, 2007, hearing does not have any bearing on whether the property owners properly perfected their appeal of the Board of Equalization's determination to the circuit court. We, too, find persuasive the authority of our neighboring state, Virginia, and find that a petition for appeal which names only one of multiple complainants, appeals only the cause of the complainant named and is "wholly insufficient as a petition for an appeal by any person other than the person named." *Carlton v. Paxton*, 14 Va. App. 105, 116, 415 S.E.2d 600, 606, 8 Va. Law Rep. 2405 (1992) (*citing Challice v. Clark*, 163 Va. 98, 102, 175 S.E. 770, 770-71 (1934)).[13]

13. Michie's Jurisprudence of Virginia and West Virginia provides:

> An appellant is one who has presented his petition to the supreme court for an appeal, showing that he is aggrieved, or has united with others in an appeal

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Furthermore, we have continually held that appeal deadlines and procedures are jurisdictional in nature. *See Helton v. Reed*, 219 W. Va. 557, 638 S.E.2d 160 (2006).[14] Because we conclude that the circuit court did

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> setting forth his grievances by pointing out the error of the lower court. **Parties not named cannot become appellants by virtue of a petition in the name of one person on behalf of himself and a number of others whose names are not mentioned. The only appellant in such case is the person whose name appears in the petition. To be an appellant the party must by name unite in the petition for appeal.** The doctrine of parties by representation has no application to such a case.

1B Michie's Jurisprudence *Appeal and Error* § 121, at 290 (Repl. Vol. 2008)(emphasis added)(*citing Challice v. Clark*, 163 Va. 98, 175 S.E. 770 (holding that petition was wholly insufficient as a petition for appeal by any person other than Nettie O. Challice, and appeal must be treated as an appeal by her alone, where petition began "Your petitioner, Nettie O. Challice, et als, respectfully represents that they are aggrieved")).

14. In *Helton v. Reed*, the taxpayer filed its severance tax appeal with the wrong tribunal. We held that "[t]he taxpayer was not permitted to cure this filing defect on the grounds that "filing requirements established by statute. . . are not readily susceptible to equitable modification or tempering." In so ruling, we cited to several cases as examples of this principle of law:

> *Concept Mining, Inc. v. Helton*, 217 W. Va. 298, 617 S.E.2d 845 (2005)(Tax Commissioner's intent was irrelevant and procedural error prohibited

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not err in finding that Mountain America was the only party that properly perfected its appeal before the circuit court, we decline to set aside the circuit court's July 18, 2007, order and we proceed to consider the remaining assignments of error only as they pertain to Mountain America.[15]

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> consideration of Commissioner's appeal); *State ex rel. Clark v. Blue Cross Blue Shield of W. Va., Inc.*, 195 W. Va. 537, 466 S.E.2d 388 (1995)(strict deadlines in insurance solvency cases); *Solution One Mortg., LLC v. Helton*, 216 W. Va. 740, 613 S.E.2d 601 (2005)(tax statutes which require the giving of bond as a prerequisite to the prosecution of an appeal are strictly construed and their requirements are mandatory and jurisdictional.) *See also Elk Run Coal Co. v. Babbitt*, 930 F. Supp. 239 (S.D.W Va. 1996)(government could not appeal due to missed deadline); *Bradley v. Williams*, 195 W. Va. 180, 465 S.E.2d 180 (1995) (taxpayer's failure to abide by the express procedures established for challenging a decision of the West Virginia State Tax Commissioner precludes the taxpayer's claim for refund or credit); *Webb v. U.S.*, 66 F.3d 691 (4th Cir. 1995)(no equitable tolling of tax filing deadlines) . . .

Helton v. Reed, 219 W. Va. at 561, 638 S.E.2d at 164.

15. Moreover, in assessing whether the other named party Appellants alternatively have a right to now intervene in the instant appeal, while arguably the overall *ad valorem* tax valuation of the property in a subdivision originally developed by Mountain America is of interest to the persons who purchased property within the subdivision, we find that this

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Appendix A

B. Constitutionality of Tax Assessment Review System

In now turning to the substantive issues on appeal, Mountain America complains that both expressly and through their practical operation as applied herein, West Virginia's statutory system for review of property tax assessments violates taxpayers' rights to due process under the state and federal constitutions. Specifically, Mountain America contends that it lacked the right to present that challenge before an impartial tribunal, was subject to an unconstitutionally excessive burden of proof, lacked meaningful notice of the government's taking of its money and meaningful opportunity to prepare and present a challenge to the taking.

Appellees generally respond that these issues are not properly before this Court because following the circuit court's decision finding that Mountain America was the only party that had properly perfected an appeal, the taxpayers then moved to amend their Petition for Appeal seeking permission to add the above-noted constitutional claims and the circuit court denied permission to amend, finding that the constitutional issues raised were beyond the scope of the original

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casual interest in the taxable valuation of the unsold residue is insufficient to permit those persons to now become Appellants to an appeal from an order of the circuit court to which they were not subject. The other taxpayers were not parties to the tax valuation appeal before the circuit court. Accordingly, they continue to remain strangers to this Court.

petition and constituted a separate and distinct declaratory action, and thus would be best raised in an independent action.

Despite the fact that these issues were not adjudicated by the circuit court below, we nevertheless may consider them for the first time on appeal to this Court if we determine that the constitutionality issues are central to our disposition in this case. "A constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. Pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005).

Mountain America asserts that West Virginia Code § 11-3-24 is facially unconstitutional for several reasons. First, Mountain America asserts that the County Commission has an inherent bias because its primary responsibility is the superintendence of its county's fiscal affairs. Thus, it argues that it was denied due process by having to present its property tax assessment appeal to the County Commission, sitting as the Board of Equalization and Review. Second, Mountain America contends that bias exists because West Virginia Code § 11-3-24 directs the county assessor to attend and render every assistance possible to the County Commission in connection with such proposed taxable values. Thus, the Assessor is a statutorily assigned advocate for the Board's interests in maximizing its revenue. Likewise, Mountain America

contends that under West Virginia Code § 7-4-1 (1971)(Repl. Vol. 2006)[16], the County Prosecuting Attorney is the general legal counsel to the County Commission. Additionally, Mountain America takes issue with the time frames established for such appeals, and asserts that it lacked meaningful notice of the government's taking of its money and meaningful opportunity to prepare and present a challenge to the taking. It alleges that this short time, coupled with the clear and convincing burden of proof imposed upon taxpayers, makes the appeals process unconstitutional.

Pursuant to West Virginia Code § 11-3-24, all county commissions are required to annually sit as a board of equalization and review "for the purpose of reviewing and equalizing the assessment made by the assessor."[17]

16. West Virginia Code § 7-4-1 provides, in part, that:

> It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the . . . commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.

17. West Virginia Code § 11-3-24 provides, in pertinent part:

> The county commission shall annually . . . meet for the purpose of reviewing and equalizing the assessment made by the assessor . . . At the first meeting, the assessor shall submit the property

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It is also statutorily mandated that "[c]ounty commissions . . . shall . . . have the superintendence and administration of the . . . fiscal affairs of their counties." W. Va. Const. art. IX, § 11. We recently had opportunity to visit the issue of whether West Virginia Code § 11-3-24 is constitutional insofar as it requires county commissions to sit as boards of equalization and review, and we found that this statute is facially constitutional. *See* Syl. Pt. 4, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (holding that "W. Va. Code § 11-3-24 (1979) which establishes the procedure by which a county commission sits as a board of equalization

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> books for the current year, which shall be complete in every particular, except that the levies shall not be extended. The assessor and his assistants shall attend and render every assistance possible in connection with the value of property assessed by them. The commission shall proceed to examine and review the personal property and the description and value of real estate liable to assessment which was omitted by the assessor. They shall correct all errors in the names of persons, in the description and valuation of property, and they shall cause to be done whatever else may be necessary to make the valuation comply with the provisions of this chapter. But in no case shall any question of classification or taxability be considered or reviewed. If the commission determine[s] that any property or interest is assessed at more or less than its true and actual value, it shall fix it at the true and actual value. . .

and review and decides taxpayers' challenges to their property tax assessments, is facially constitutional."). In *Foster*, we also determined that the County Commission's overarching interest, as the governmental body charged with superintendence of the fiscal affairs of the county, in the outcome of every challenge to its tax base, was not a sufficient conflict of interest to support a taxpayer's due process violation claim in deciding the outcome of such challenges. *In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. at 20, 672 S.E.2d at 160. Furthermore, we held that "[r]equiring a taxpayer challenging a property tax assessment in accordance with W. Va. Code § 11-3-24 (1979)(Repl. Vol. 2008) to prove by clear and convincing evidence that the assessor's assessment is erroneous does not violate the constitutional due process protections provided by section one of the Fourteenth Amendment to the United States Constitution or by section ten of Article III of the West Virginia Constitution." Syllabus Point 6, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (2008)." *See Id.*, Syl. Pt. 6; *See also Bayer MaterialScience, LLC v. State Tax Commissioner*, 223 W. Va. 38, 672 S.E.2d 174.[18] Generally, we have also

18. Note that while the author of this opinion may personally disagree with the clear and convincing burden of proof standard imposed upon taxpayers appealing *ad valorem property* tax assessments, *see In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (Benjamin, J. dissenting), it is observed that the instant case is governed by the principles of stare decisis.

recognized with respect to legislative enactments pertaining to taxation that "[s]tatutes governing the imposition of taxes are generally construed against the government and in favor of the taxpayer. However, *statutes establishing administrative procedures for collection and assessment of taxes will be construed in favor of the government.*" Syl. Pt. 1, *Calhoun County Assessor v. Consolidated Gas Supply Corp.*, 178 W. Va. 230, 358 S.E.2d 791 (1987)(emphasis added).

Because this Court, in our existing precedent, has resolved the issue of the facial constitutionality of West Virginia Code § 11-3-24 as it pertains to the issues of whether the county commission may impartially sit as the board of equalization and review and the constitutionality of the burden of proof imposed upon taxpayers challenging a tax assessment on appeal, we need not here analyze these particular arguments any further. However, our analysis does not conclude there. In addition to arguing that West Virginia Code § 11-3-24 is facially unconstitutional for the reasons stated above, Mountain America also contends that the statute is unconstitutional as applied to the facts of this case. Specifically, it argues that the inherent bias that already exists in this statutory system is particularly exacerbated in this case because: (1) the county commission has appeared as a party litigant adverse to its appeal; (2) the salaries authorized for the members of the Commission increased by $ 660.00 per member as a result of the excessive assessments; and (3) it was not given meaningful notice of the government's taking of its money and meaningful opportunity to prepare and present a challenge to the taking.

"To establish that a taxing statute, valid on its face, is so unreasonable or arbitrary as to amount to a denial of due process of law when applied in a particular case, the taxpayer must prove by clear and cogent evidence facts establishing unreasonableness or arbitrariness. Syl. Pt. 4, *Norfolk and Western Railway Company v. Field*, 143 W. Va. 219, 100 S.E.2d 796 (1957); Syl. Pt. 2, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W. Va. 524, 170 S.E.2d 362 (1969). "Cogent" is defined as "[c]ompelling or convincing." Black's Law Dictionary 295 (9th ed. 2009). Thus, "clear and cogent evidence" may also be construed as "clear and convincing evidence." *In re: Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14 n.13, 672 S.E.2d at 158 n. 13 *(citing McKesson Water Prods. Co. v. Director, Div. of Taxation*, 23 N.J.Tax 449, 456 n. 3 (N.J. Super.Ct.App.Div. 2007)).

As it pertains to Mountain America's argument that its due process rights were violated because the County Commission filed an answer to the Appellants' Petition for Appeal to the Circuit Court and thus became a party to this proceeding, we find that this argument lacks merit. County commissions have often been made parties to these types of appeals. Indeed, County Commissions have made numerous appearances in these types of appeals before this Court.[19] By filing a response to the

19. *See, e.g., Bayer MaterialScience, LLC v. State Tax Commissioner*, 223 W. Va. 38, 672 S.E.2d 174 (Kanawha County

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Commission appeared as party); *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 (Cabell County Commission appeared as party); *Central Realty Co. v. Board of Equalization and Review of Cabell County*, 110 W. Va. 437, 158 S.E. 537 (1931); *Gilbert v. County Court of Wyoming County*, 121 W. Va. 647, 5 S.E.2d 808 (1939); *In re Stonestreet*, 147 W. Va. 719, 131 S.E.2d 52 (1963)(defendants were Commissioners of the County Court of Calhoun County); *Tug Valley Recovery Center, Inc. v. Mingo County Commission*, 164 W. Va. 94, 261 S.E.2d 165 (1979)("The respondents are elected members of the Mingo County Commission, and in this capacity, sat as a Board of Equalization and Review during the month of February 1978"); *The Great A & P Tea Co., Inc. v. J Carney Davis, Assessor of Marion County, West Virginia, and Marion County Board of Review and Equalization*, 167 W. Va. 53, 278 S.E.2d 352 (1981); *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia and East Kentucky Energy Corp. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989); *Eastern American Energy Corporation v Robert W. Thorn, Assessor of Wirt County, and C. Richard Boice, Commissioner of the County Commission of Wirt County, Paul Bumgarner, Commissioner of the County Commission of Wirt County, and Harry Matheny, Commissioner of the County Commission of Wirt County, in their Capacities as County Commissioners and in Their Capacities as Members of the County Board of Equalization and Review*, 189 W. Va. 75, 428 S.E.2d 56 (1993); *Western Pocahontas Properties, Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993); *In re Elk Sewell Coal*, 189 W. Va. 3, 427 S.E.2d 238 ("Ernest V. Morton, Jr., Pros. Atty., Webster Springs", attorney for Webster County Commission); *Rawl Sales & Processing Co. v. County Commission of Mingo County*, 191 W. Va. 127, 443

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Appellants' Petition for Appeal, the County Commission urged the circuit court to affirm its ruling that the assessments were proper. The County Commission's response was necessarily due to the fact that in making a ruling upholding the Assessor's valuation of Mountain America's residual property, the County Commission, sitting as the Board of Equalization and Review, was not statutorily required to issue a written opinion. Thus, by virtue of requiring a response to a petition for appeal from a County Commission decision, the circuit court was able to obtain information regarding the County Commission's reasoning in upholding the Assessor's valuations. When balancing the circuit court's interest in acquiring necessary information from the County Commission regarding its review of tax appeals, with the general due process interests of the taxpayers to be provided an avenue of appeal from a property tax

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S.E.2d 595 (1994); *In re the Petition of Maple Meadow Mining Company for Relief from Real Property Assessment for the Tax Year 1992*, 191 W. Va. 519, 446 S.E.2d 912 (1994) ("Carl W. Roop, Canterbury, Poling & Roop, Beckley, for Raleigh County Commission"); *Bookman v. Hampshire County Commission*, 193 W. Va. 255, 455 S.E.2d 814 (1995); *In re the 1994 Assessments of the Property of Massimo A. Righini, Marilou M. Righini, J. David Magistrelli and Diane Magistrelli*, 197 W. Va. 166, 475 S.E.2d 166 (1996)("Richard G. Gay, Berkeley Springs, for Morgan County Commission"); *In re Tax Assessment Against American Bituminous Power Partners, L.P.*, 208 W. Va. 250, 539 S.E.2d 757 (2000)("Frances C. Whiteman, Esq., Whiteman, Burdette & Radman, PLLC, Fairmont, West Virginia" is listed as "Attorney for Appellant Marion County Commission").

assessment, we do not believe that this procedure necessarily demonstrates a level of bias constituting a deprivation of the Appellant's due process.

Furthermore, as to Mountain America's second argument regarding the direct pecuniary interest of the County Commission members in this case, to the extent that we have made the determination, as further discussed below, that the Assessor's valuation of Mountain America's residual property was not excessive, we need not address Appellant's argument that the members of the County Commission received increased salaries as a result of the assessment. Morever, we seriously question whether a pay increase of $ 660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute. *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 579, 93 S.Ct.1689, 1698, 36 L.Ed.2d 488, 500 (1973)(reiterating that "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.")

Lastly, with respect to Mountain America's contention that it was not given meaningful notice of the government's taking of its money and meaningful opportunity to prepare and present a challenge to the taking, we conclude otherwise.[20] Specifically, Mountain

20. We must only consider the argument raised regarding the notice procedures and time for preparation on appeal as it

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America argues that pursuant to West Virginia Code § 11-3-24, the County Commission sits as the Board of Equalization and Review only during the month of February, thus leaving taxpayers with scarce time to prepare challenges to an assessment once notified. It asserts that its opportunity for review was even more abbreviated by the fact that the County Commission adjourned on February 15th, the earliest day that they were statutorily permitted to adjourn. Thus, the period of time allowed to receive the mailed notice sent by the Assessor, notify the Board of Equalization and Review of its desire to appeal, and prepare evidence to support its challenges of the proposed increase in the taxable value of its property was unreasonably compressed into three weeks. Mountain America asserts that, as a practical matter, timely access to information about the true and actual values of other comparable properties is integral to raising a challenge on appeal to the Board of Equalization and Review. It contends that the former can only be ascertained by engaging the services of a professional appraiser to survey recent sales of comparable properties, requiring that a Freedom of Information Act request be filed to obtain access to the assessor's proposed property books containing such data. Thus, it asserts that the constricted time frame

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specifically applies to Mountain America. To the extent that the Petition for Appeal in this case was filed on behalf of numerous individually-named Appellants who we have now determined did not properly perfect an appeal at the circuit court level, much of Appellants' argument on this issue is inapplicable.

for preparation of an appeal limits the effectiveness of such challenge.

Although Mountain America makes generalized arguments that the notice system set forth in West Virginia Code § 11-3-24 violates due process, it has not advised this Court of how it specifically suffered prejudice as a result of the "constricted" time frame upon appeal to the Board of Equalization and Review. There is no allegation that the hearing afforded Mountain America violated West Virginia Code § 11-3-24. Rather, the hearing afforded was in compliance with statutory requirements. Mountain America, however, has not explained what evidence it was prevented from presenting at the hearing due to insufficient time. In fact, Mountain America had adequate time to hire a real estate appraiser who appears to have performed the analysis asked of him by the Appellants, and who testified on its behalf at the hearing. However, the appraiser did not present any evidence to the County Commission as to what Mountain America paid for the land at issue, and what it expended in developing and improving the land. Mountain America also failed to present any evidence regarding the appraisal of its property which was prepared during the lending process, or to ask the appraiser to appraise its property for submission as evidence. It also failed to present evidence as to the listing price for any of the lots it had for sale in Walnut Springs. For these reasons, we find that Mountain America has not met its burden to prove by clear and cogent evidence the requisite facts establishing that the time frame for a tax assessment appeal under West

Virginia Code § 11-3-24 is so unreasonable or arbitrary as to amount to a denial of due process of law in this case.

C. Equal and Uniform Taxation

In its remaining assignments of error, Mountain America asserts that the taxation of its property was not equal and uniform, and thus, was in violation of Article X, Section 1 of the West Virginia Constitution because its property was overvalued and comparable properties in the area were systemically undervalued.[21] Mountain America asserts that after two reviews in 2006, the State Tax Department determined that the Assessor had failed to update the taxable values of properties throughout Monroe County, including the areas in the immediate vicinity of Walnut Spring, and was thus valuing those properties at well below market value. It asserts that at the County Commission hearing, it presented evidence that proved that its property was overvalued by presenting expert testimony from Todd Goldman, an appraiser, who showed that the Assessor's valuation was excessive.[22]

21. Article X, Section 1 of the West Virginia Constitution provides that "taxation shall be equal and uniform throughout the State, and all property, both real and personal, shall be taxed in proportion to its value. . ." Moreover, "no one species of property for which a tax may be collected shall be taxed higher than any other species of property of equal value."

22. Mountain America asserts that Todd Goldman testified that for the several dozen parcels in Walnut Springs, the County

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Mountain America argues that in appealing a tax assessment, a showing sufficient to obtain relief can be made "upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under- or over-appraised by the tax commissioner or wrongly assessed by the assessor." *Kline v. McCloud*, 174 W. Va. 369, 373, 326 S.E.2d 715, 719 (1985). Thus, it asserts that because it proved that its property was overvalued and made a showing that the tax appraisal was erroneous, the Assessor was bound to rebut the taxpayer's evidence[23] but could not adequately do so.

Specifically, Mountain America asserts that the Assessor could not adequately explain the basis of her assessment and could not identify or explain the various tests undertaken by the State Tax Department to measure the fairness and equality of the Monroe County land books. It also alleges that the Assessor admitted that when she valued the residue, she took into

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Assessor's values ranged anywhere from a low of 15% of recent sales prices to a high of 438% of recent sales prices, with an average value of 152% of documented recent sales prices. Mr. Goldman also sampled several dozen properties throughout the county sold after July 1, 2006, and those properties were assessed, on average, at 47.13% of their true and actual values as reflected by their recent sales prices.

23. Pursuant to *In Re Pocahontas Land Co.*, 172 W. Va. 53, 61, 303 S.E.2d 691, 699 (1983), once a taxpayer makes a showing that tax appraisals are erroneous, the Assessor is then bound by law to rebut the taxpayer's evidence.

consideration that its "proposed use" was residential, but West Virginia Code § 11-3-1b(c)(2000)(Repl. Vol. 2008)[24] prohibits an Assessor from considering a proposed future use of property. It believes that the Assessor acted arbitrarily in designating Walnut Springs as its own "neighborhood," as it was not equal and uniform with other comparable properties in the area. The Appellees dispute Mountain America's assertion and claim that the Assessor used the correct valuation methodology under West Virginia Code § 11-3-1 to determine the true and actual value of the Walnut Springs properties.

"'As a general rule, there is a presumption that valuations for taxation purposes fixed by an assessor are correct. . . . The burden is on the taxpayer

24. West Virginia Code 11-3-1b(c) provides:

> The designation of proposed land use by a county or municipal planning authority may not be used or considered by an assessor in determining the appraised value of property included under a designation of proposed land use by a county or municipal planning authority until such time as the actual use of the real property has changed to correspond to the proposed use. For purposes of this subsection, the actual use of real property shall be treated as having changed to correspond to the proposed use as improvements on the property necessary for the proposed use are completed: Provided, That in valuing the property before its change to actual use, the assessor may consider the factors described in subsection (b) of this section.

challenging the assessments to demonstrate by clear and convincing evidence that the tax assessment is erroneous.' Syllabus point 2, in part, *Western Pocahontas Properties Ltd. v. County Commission of Wetzel County*, 189 W. Va. 322, 431 S.E.2d 661 (1993)." Syl. Pt. 8, *Bayer Material Science, LLC, v. State Tax Commissioner*, 223 W. Va. 38, 672 S.E.2d 174 (2008); *See also* Syl. Pt. 5, in part, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W. Va. 14, 672 S.E.2d 150 ("A taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such assessment is erroneous.").

Article X, Section 1 of the West Virginia Constitution requires that "all property, both real and personal, shall be taxed in proportion to its value to be ascertained as directed by law." For taxation purposes, property is to be assessed "at its true and actual value." W. Va. Code § 11-3-1. "True and actual value" has been defined as "market value"[25] and "the price paid for property in an arm's length transaction." *Kline v. McCloud*, 174 W. Va. at 372, 326 S.E.2d at 719. "The price paid for property is not conclusive as to value, but it may be a very important element of proof where there has been an

25. *See* Syl. Pt. 3, in part, *Killen v. Logan County Comm'n*, 170 W. Va. 602, 295 S.E.2d 689 (1982), overruled on other grounds by *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 223 W. Va. 14, 672 S.E.2d 150; *see also Kline v. McCloud*, 174 W. Va. at 372, 326 S.E.2d at 718 (true and actual value means fair market value, which is what the property would sell for if it were sold on the open market.)

open transaction between competent parties dealing at arm's length as appears from the evidence. . . In many jurisdictions, evidence of current market value is given substantial, if not conclusive, weight." *Id.* (citations omitted). A taxpayer whose property is assessed at true and actual value must show *more than* the fact that other property is valued at less than true and actual value in order to obtain relief under Article X, Section I. *Id.* (emphasis added). To obtain relief, he must prove that the under valuation was intentional and systematic." *Id.*

Upon our review of the record, we conclude that the circuit court did not err by upholding the challenged tax assessment because Mountain America has not sufficiently sustained its burden of proof. Mountain America had the burden of proving that the Assessor's valuation was excessive, but it did not offer any evidence of the true and actual value of the residual property. At the hearing before the County Commission, Mountain America did not offer an appraiser's opinion of the value of its residue, any evidence as to what it paid to purchase this residue, or any evidence as to the listing price for any of the unsold residue property. While Mountain America's expert appraiser, Mr. Goldman, testified that all of the taxpayers' properties were assessed at an average value of 152% of documented recent sales prices, and that several other dozen properties throughout the county sold after July 1, 2006, were assessed, on average, at 47.13% of their true and actual values as reflected by their recent sales prices, he did not provide testimony as to his opinion of the true and actual value of Mountain America's residual property.

Conversely, the Assessor testified that she created a new neighborhood for Walnut Springs because the unimproved real property sold by Mountain America and its entities was significantly higher than any other unimproved real property being sold elsewhere in Monroe County. Before doing so, the Assessor spoke to the West Virginia Department of Revenue. She also asserts that according to the State Tax Department Notice 2006-16, issued on January 31, 2006, a subdivision may stand alone as a "neighborhood" if it is unique. The Assessor determined that there was no comparable development in the county offering the amenities and covenants touted by Walnut Springs.

The record before us reflects that with the high purchase prices of the properties when they are sold, the Assessor's use of such a "neighborhood" for Walnut Springs was consistent with applicable law and effected a fair assessment of Mountain America's property. The Assessor undertook the valuation of real properties owned by the Appellants in Walnut Springs, which, on July 1, 2006, included some developed lots and undeveloped residue. In creating the neighborhood, the Assessor considered the following information concerning the real property: parcel size, roads, topography, cost, type, and quality of improvements. In calculating the 2007 real property assessments for Walnut Springs, the Assessor compiled a list of sales in the development for the period from July 1, 2005, to June 30, 2006. She then calculated the price per acre for each sale which occurred during that time period. Once the price per acre for each sale was calculated,

she took the average of all sales during that period. The calculated unit price per acre was $ 29,236, a figure significantly higher than any other real property sales in Monroe County.

Furthermore, as an accommodation to the landowners, the Assessor attempted to lower the per acre assessment in the neighborhood by striking the two highest sales and the two lowest sales and recalculating the average price per acre. The calculated unit price per acre based on actual sales was $ 28,502. She then entered the neighborhood information into the real estate mass appraisal software (CAMA), and again lowered the assessment per acre to $ 26,900 in a further attempt to lower the tax burden on the landowners. Once all of the information was entered into the CAMA software, the residual property value for the neighborhood was calculated at approximately $ 5,400 per acre, a figure significantly lower than the asking price for such acreage.

We find that it was appropriate, based upon our existing law, for the Assessor to utilize the "market value" or "the price paid for property in an arm's length transaction" in assessing the "true and actual value" of Mountain America's property. Other than disagreeing with the appraised values the Assessor obtained by following the appraisal methods prescribed by West Virginia law, Mountain America has not demonstrated by clear and convincing evidence that the Assessor's assessment of its property was incorrect. Therefore, we find no abuse of the Assessor's discretion. Having found

no abuse of the Assessor's discretion in rending the subject assessment, we affirm the circuit court's order affirming the County Commission's decision upholding the Assessor's assessment.

D. Intentional and Systematic Under-Assessments

Additionally, Mountain America argues that the Equal Protection Clauses of both the state and federal constitutions do not allow the Assessor to intentionally and systematically assess recently sold properties at or above their current selling prices, while not making comparable adjustments to properties that have not been recently sold. In support of its argument, Mountain America cites to *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688 (1989), wherein the Supreme Court held that the property tax valuations set by the Assessor of Webster County, West Virginia violated the Equal Protection Clause. In *Allegheny*, the assessor set the value of certain real property at a figure equal to 50% of the price paid during a recent arm's length sale, but the values of the recently sold property were set at roughly eight to thirty-five times more than the values of comparable neighboring property which had not been recently sold. The Supreme Court concluded that the Webster County Assessor's process systematically and intentionally discriminated against the taxpayers. *Id.*

Mountain America asserts that the facts of this case are so similar to *Allegheny* that the circuit court erred in finding that the Assessor's process here did not

systematically and intentionally discriminate against it. Specifically, it argues that the State Tax Department's testing clearly shows that generally, property tax values throughout Monroe County are suspect and have been for years. It also asserts that the Assessor admitted that she was aware of the systematic undervaluation but claimed that she was attempting to alleviate years of undervaluation by undertaking annual across-the-board increases of six percent of all real property values in the county. Mountain America believes the Assessor's plan is problematic because if the base values are not fair, equal, and uniform in proportion to fair market value as to all the properties within a particular species, any equal across-the-board increase of all those properties will simply assure a perpetuation of the problem.

The County Assessor responds that Mountain America simply failed to present evidence to prove that the assessments were incorrect because they never articulated what they believe the value of their properties to be. They argue only that other properties in the county are undervalued for a short time period, and that the state and federal Equal Protection Clauses do not require immediate general adjustments by an Assessor. Rather, a landowner must establish a history of unequal treatment of similarly-situated property. The County Commission echoes these arguments, and also asserts that Mountain America misconstrues *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688, because in that case, the taxpayers showed that other "comparable" property

in Webster County, West Virginia was worth substantially the same as their property but was "intentionally and systematically" assessed at lower values by the county. The properties in Walnut Springs have not been shown to be comparable to any other property in Monroe County.

As we held in *Kline v. McCloud*, "[t]he Equal and uniform clause of Section 1 of Article X of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show *more than* the fact that other property is valued at less than true and actual value. To obtain relief, he must prove that the under valuation was intentional and systematic." Syl. Pt. 1, *Kline v. McCloud*, 174 W. Va. 369, 326 S.E.2d 715 (emphasis added). Indeed, "[t]he rule is well settled that a taxpayer, although assessed on not more than full value, may be unlawfully discriminated against by undervaluation of property of the same class belonging to others . . . But, unless it is shown that the undervaluation was intentional and systematic, unequal assessment will not be held to violate the equality clause." *Id.* at 374, 326 S.E.2d at 720.

Upon review of the facts in the record in this case, we conclude that the circuit court did not commit error in ruling that Mountain America failed to meet its burden to prove that other comparable property was intentionally and systematically under valuated. In *Allegheny Pittsburgh Coal Co. v. County Comm'n of Webster County*, 488 U.S. 336, 109 S. Ct. 633, 102 L.Ed.2d 688, the Supreme Court held that assessments

made on real property by the Webster County Assessor violated the Equal Protection Clause because the taxpayers showed that other "comparable" property in Webster County was worth substantially the same as their property but was "intentionally and systematically" assessed at lower values by the county. *Id.* at Syl. Pts. 2 and 3. Therein, the taxpayers' property had been assessed at roughly eight to thirty-five times more than comparable neighboring property and these discrepancies had continued for more than ten years with little change. The Court determined that the county's adjustments to assessments that were carried over were too small to seasonably dissipate the disparity. *Id.*

Below, Mountain America was not able to show that the properties within Walnut Springs were in fact "comparable" to surrounding properties. In fact, rather than being comparable, Walnut Springs lots were touted to be unique, superior, and more valuable than surrounding properties. The higher sales prices for Walnut Springs property are likely due to the fact that the lots contain amenities only available in this particular neighborhood. Herein, the record before the circuit court showed that the property that surrounded the property in question has always sold for prices much below the price of lots in Walnut Springs, and thus, the lower sales prices cause the adjoining property to be assessed at a much lower rate.

Furthermore, even assuming *arguendo* that Walnut Springs properties were comparable to other properties

in Monroe County and disparate treatment had occurred, we still find the facts of *Allegheny Pittsburgh Coal* distinguishable from the instant case. In *Allegheny*, the taxpayers showed that the assessor failed to make valuation adjustments to comparable land for more than ten years. 488 U.S. at 343, 109 S. Ct. at 638, 102 L.Ed.2d. at 697. The Supreme Court held:

> As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes . . . [citations omitted] . . . it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

Id.

This Court has likewise recognized that

> "[t]he system of taxation unfortunately will always have some inequality and nonuniformity attendant with such governmental function. It seems that perfect

> equality in taxation would be utopian, but yet, as a practicality, unattainable. We must satisfy ourselves with a principle of reason that practical equality is the standard to be applied in these matters, and this standard is satisfied when the tax system is free of systematic and intentional departures from this principle."

Kline, 174 W. Va. at 374, 326 S.E.2d at 720 (*quoting Meyer v. Cuyahoga County Bd. of Revision*, 58 Ohio St.2d 328, 390 N.E.2d 796 (1979)). A disgruntled landowner must establish a history of unequal treatment of similarly-situated property. *See, e.g., Petition of Maple Meadow Min. Co. for Relief from Real Property Assessment for Tax Year 1992*, 191 W. Va. 519, 446 S.E.2d 912 (1994).

As a matter of practicality, not all property in the county can be revalued at one time. For this reason, West Virginia Code § 11-1C-1 requires a county assessor to revalue every parcel in the county every three years. Walnut Springs is a new development and the 2007 tax year is the first year in which an assessment dispute has arisen. Thus, assuming a disparity did exist between the Walnut Springs assessments and other properties found to be comparable thereto, the Assessor would necessarily be given the opportunity to make "seasonable attainment of a rough equality" over a short period of time. Accordingly, we affirm the circuit court's ruling finding that Mountain America failed to show that other such property was intentionally and systematically under valuated.

IV.

CONCLUSION

For the foregoing reasons, the January 28, 2008, order of the Circuit Court of Monroe County is hereby affirmed.

Affirmed.

APPENDIX B — ORDER OF THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA DENYING PLAINTIFF'S PETITION FOR APPEAL FROM AD VALOREM PROPERTY TAX ASSESSMENTS DATED JANUARY 25, 2008

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

Civil Action No.: 07-C-30

MOUNTAIN AMERICA, LLC

Taxpayers/Petitioners,

vs.

DONNA HUFFMAN, ASSESSOR OF MONROE COUNTY

Respondent.

ORDER DENYING PLAINTIFF'S PETITION FOR APPEAL FROM AD VALOREM PROPERTY TAX ASSESSMENTS

This matter came before the Court by virtue of the Taxpayers/Petitioners' Brief in Support of Appeal From Ad Valorem Property Tax Assessments filed on July 5, 2007. The Taxpayer/Petitioners, were not present, but appeared by counsel Robert S. Kiss, Esq., and Mike Caryl, Esq. The Respondents, Donna Huffman, appeared in person and by counsel, John Hussell and the Monroe County Commission appeared by counsel, Paul G. Papadopoulos.

Appendix B

I. FACTUAL BACKGROUND

The Assessor of Monroe County, Donna Huffman, (hereinafter "the Assessor") undertook the valuation of real properties owned by the Taxpayers/Petitioners (hereinafter "the Taxpayers") in the geographic area referred to as Walnut Springs Mountain Reserve (hereinafter "Walnut Springs") for the 2007 ad valorem property tax year. The property in question is comprised of approximately 1,000 acres located on Bud Ridge Road, near Union, West Virginia, and it appears to have included some developed lots and undeveloped residue.

The Taxpayers filed and presented their applications for review by the County Commission, sitting as a Board of Equalization and Review, seeking relief from the assessments of their real property. A hearing was held before the County Commission on February 7, 2007, as to the matters contained in the taxpayers' applications and a decision was rendered by the County Commission on February 15, 2007. The Commission deliberated and voted unanimously to uphold the assessments made by the Assessor and found the Assessor's methods of appraisal were pursuant to West Virginia Law. A written notice of the decision was mailed to the Taxpayers' counsel of record.

At the hearing in front of this Court, on September 18, 2007, the Defendant argued, *inter alia*, that: the Assessor's assessments of the taxpayers' property do not represent the "true and actual value" of the property; the County Commission erred in relying upon

appraisals which disregarded applicable regulations with respect to the valuation of the property in question; and the assessment made on the land owned by Mountain America, LLC was not assessed at the same rate as other adjoining land or comparable land in Monroe County, in violation of Section 1, Article X of the Constitution of West Virginia.

The Respondent Assessor argued, *inter alia*, that the Assessor utilized the correct valuation in determining the "true and actual value" of the residue of property owned by Mountain America, LLC, as prescribed by West Virginia Legislature and other state regulations. The Respondent County Commission argued, *inter alia*, that the raw data provided during the hearing shows that the residue was assessed at a rate which was absolutely reasonable on its face; the Taxpayers did not meet their burden to show that assessment was excessive, and the Taxpayers did not submit necessary evidence as to what actually was the "true and actual value" of their property.

II. DISCUSSION OF AUTHORITY

Pursuant to W. Va. Code § 11-3-1, the county Assessor is charged with assessing the value of all property located within the county. Also, it is a general rule that valuations for taxation purposes fixed by an assessing officer are presumed to be correct, since the burden of showing an assessment to be erroneous is upon the taxpayer, and proof of such fact must be clear. *Eastern Am. Energy Corp. v. Thorn*, 189 W. Va. 75 (1993).

Simply put, it is the burden of the taxpayer to show that the valuations set by the county are excessive. Syl. Pt. 1, *W. Pocahontas Properties, Ltd., v. County Comm'n of Wetzel Co.*, 189 W. Va. 322, (1993).

Kline v. McCloud, 174 W. Va. 369, the West Virginia Supreme Court stated that "The Equal and uniform clause of Article X, Section 1 of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to show *more than* the fact that other property is valued at less than true and actual value. To obtain relief, he must prove that the under valuation was intentional and systematic. *(emphasis added).*

The steps an Assessor must take into account when determining the "true and actual value" of property are set forth in statutory guidelines, state regulations, and case law. First and foremost, an Assessor must comply with W. Va. Code § 11-3-1, et seq. More specifically, W. Va. Code 11-3-19 mandates that the Assessor must complete his or her assessment and deliver the county land books containing the assessment values to the county commission, sitting as the Board of Equalization and Review by February 1 of each year.

Next, the Assessor is required to follow the legislative rules set forth in W. Va. R. tit 189 § 2-1, et seq. (2006) in valuing real property for tax purposes. The appraiser must follow a systematic procedure in collecting the data which involves: verifying the parcel number, record/verify property owner's name, mailing

address and legal description; record property class; record the tax class; record the neighborhood code; record card number; record property address; and record property factors. W. Va. R. tit 189 § 2-2.4

The Assessor must also comply with the West Virginia State Tax Department Administrative Notice 2006-16, which requires the Assessor to divide the county into neighborhoods, giving consideration to similarities such as parcel size, road, topography, costs, type, and quality of improvements for land pricing. It defines a "neighborhood" as a "geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends, and housing characteristics." If a subdivision or agricultural area is unique, it may stand alone as a single neighborhood. *Id.*

West Virginia case law also tends to give the Assessor some guidance when determining the "true and actual value" of a given piece of property. *Eastern Am Energy Corp*, recognized that the price paid for property in an arm's length transaction, while not conclusive, is relevant evidence of its true and actual value. Such evidence may not be rejected in favor of the tax commissioner's old appraisal and determined that "true and actual value" means the fair market value—what property would sell for if sold on the open market.

It is well settled law in West Virginia that the standard of review for an appeal to the circuit court for

the reduction of an Assessor's valuation for the taxation of land is heard solely on the record before the County Commission sitting as the Board of Equalization and Review. Syl. Pt, *Gilbert v. County Court of Wyo. County*, 121 W. Va. 647 (W. Va. 1939); see also W. Va. Code 11-3-25 (2003). In addition, an objection to any assessment may be sustained only upon the presentation of competent evidence, such as that equivalent to testimony of qualified appraisers, that the property has been under valued or over valued by the Assessor. Syl. Pt. 8, *Killen v. Logan County Comm'n*, 170 W. Va. 602 (1982).

Only if the taxpayer is successful in carrying his burden of showing that the valuations are erroneous, can the Court have authority to grant relief pursuant to W.Va Code § 11-3-25. In pertinent part § 11-3-25 states, "If upon hearing of such appeal [the Court] determines that any property has been valued at more than its true and actual value, or illegally classified or assessed, the circuit court shall, by an order of record, correct the assessment and fix the property at its true and actual value"

III. CONCLUSION

After reviewing all the relevant evidence, listening to the arguments of both parties and consulting the pertinent legal authorities, the Court is of the opinion that the Assessor acted in conformity with the statutory authority, state regulations, and case law pertaining to her position as a county Assessor and in doing so, she valued the property appropriately within the guidelines

prescribed by the West Virginia Code. In addition, this Court finds that the County Commission properly weighed the evidence before it and did not err in its decision to uphold the assessments made by the Assessor. Therefore, the Taxpayers Appeal From Ad Valorem Property Tax Assessments should be denied.

To support its contentions, the Court will briefly review the evidence before it from the Board of Equalization and Review Hearing:

According to the record below, during the period of July 1, 2006 to January 31, 2007, the Assessor and her staff set out to ascertain the true and actual value of all property, real and personal, subject to ad valorem property taxation located within Monroe County West Virginia. *Board of Equalization and Review Hearing, p. 68* (Feb. 7, 2007) [hereinafter "Hearing Transcript"]. It is the Assessor's duty to assess all real property at sixty percent (60%) of its fair market value. *Id.* at 73. Included in the valuation for the 2007 tax year was the recent development commonly known as Walnut Springs. Since September 2004, Mountain America, LLC and other entities have undertaken to develop the Walnut Springs area, into a housing development by building roads, making other improvements and by selling lots or tracts of property. *Id.* at 97-98.

Apparently in the past, Monroe County has frequently assessed real property below sixty percent of its fair market value in the last decade. *Id.* at 92. As a result of the deficiencies, the Assessor was required to

submit a proposed plan of action to correct the deficiencies in the assessment of real property in Monroe County. *Id.* at 93. In accordance with her plan of action the Assessor increased all real property assessments throughout Monroe County six percent (6%) for the 2006 year and (15%) for the 2007 year *Id.* at 92, 97.

At the hearing on February 7, 2007, the Respondent, utilized the Assessor as it's principal witness to tell the County Commission how she came to the valuation of the property in Walnut Springs. The Assessor stated that she created a new neighborhood for Walnut Springs because the unimproved real property sold by Mountain America, LLC and its entities was significantly higher than any other unimproved real property being sold elsewhere in Monroe County, West Virginia. *Hearing Transcript* at 96. Before doing so, the Assessor spoke with the West Virginia Department of Revenue. *Id.*

In calculating the 2007 real property assessments for the Walnut Springs neighborhood, the Assessor compiled a list of sales in the development from the period of July 1, 2005, to June 30, 2006. *Id.* at 104. Next, the Assessor calculated the price per acre for each which occurred during the period from July 1, 2005, to June 30, 2006. Id at 97, 104-106. Once the price per acre for each sale was calculated, the Assessor took the average of all sales during the period of July 1, 2005 to June 30, 2006. *Id.* The calculated unit price per acre was $29,236.00. Id at 97. In an attempt to lower the per acre assessment in the neighborhood, the Assessor struck

the two highest sales and the two lowest sales and recalculated the average price per acre. *Id.* at 99. The new price was calculated at $26,900.00. *Id.* The Assessor then had to calculate the residual property for the neighborhood, which came out to be approximately $5,400.00 per acre. *Id.* at 105-106.

At the same hearing the Taxpayers put on their own expert, Todd Goldman, as its principal witness to attack the assessments made by the Assessor. Mr. Goldman is a certified general real estate appraiser. *Hearing Transcript* at 8. He stated that values made by the Assessor were clearly not representative of the true and actual value of the parcels as required by W.Va. Code § 11-3-1. Despite being an appraiser, Mr. Goldman did not appraise, but instead he made several statistical analysis by comparing sales prices of Walnut Springs to several other properties which are located outside of the neighborhood, but in Monroe County. In particular, he stated that the properties that are either contiguous, or in close proximity to the Walnut Springs properties were valued at an absurdly and/or unfairly high rate. *Id.* and Petitioner's Exhibit Number 8.

From the foregoing evidence contained in the record, it appears that the County Commission came to a reasonable conclusion as contained in it's Order that the Assessor followed the state law regarding the assessment. It appears that the Assessor in this case followed all of the guidelines laid out for her to complete the tax assessment. In particular, it appeared proper for her to create a neighborhood for Walnut Springs

because it was a distinct area of residential development compared to the area surrounding it; she used the arm's length sales transaction price to derive the "true and actual value" of the property at hand which is permissible under West Virginia state law; and she appeared to go a step further in an attempt to lower the tax burden on the Taxpayers when she threw out the two highest sales and two lowest sales at Walnut Springs. At the oral argument on their appeal, the Taxpayers' counsel was unable to point to a single deviation from state regulations by the Assessor and merely, but argued that comparable property across the road and the property in Monroe County in general was assessed at a much lower rate.

When the evidence on the record is taken as a whole and is applied to applicable state law, the Court finds that the Taxpayers have failed to show by clear proof that the Monroe County Assessor's assessment was erroneous and/or excessive. The record shows that the taxpayers did not introduce evidence as to what it paid for the property in question; evidence to show the value of improvements made to the land after its purchase; nor evidence as to the listing price for any of this unsold residue property, all of which would have been allowed to establish the "true and actual value" under West Virginia state law as cited above.

As the West Virginia Supreme Court stated in *Kline*, that "The Equal and uniform clause of Article X, Section 1 of the West Virginia Constitution, requires a taxpayer whose property is assessed at true and actual value to

show ***more than*** the fact that other property is valued at less than true and actual value." *(emphasis added)* One thing that does appear clear in the arguments to the Court and in the record below is that that the Taxpayers feel that other property surrounding Walnut Springs is valued at less than it's true and actual value, but there is no evidence in the record to show that such property was intentionally and systematically under valuated as required by West Virginia state law.

Instead, it appears from the record that the property that surrounds the property in question has always sold for prices much below the price of lots in Walnut Springs. This in turn cases the adjoining property to sell for and be assessed at a much lower rate. Although the record is not clear as it might be, it appears that the lots contained in Walnut Springs have been developed and contain many amenities not available on the adjoining lands and are only available in the new neighborhood, thus causing the adjoining lands to sell for much lower prices and the resulting assessments. Therefore, the Court concludes that the Taxpayers' Appeal from Ad Valorem Property Tax Assessment shall be denied and the County Commission's decision shall be affirmed.

Appendix B

Accordingly, it is hereby **ORDERED** and **ADJUDGED** that:

1. Taxpayers' Appeal From Ad Valorem Property Tax Assessment is **DENIED.**

2. The Monroe County Commission's decision to uphold the finding that the Assessor's methods of appraisal were pursuant to West Virginia Law is **AFFIRMED.**

3. The Circuit Clerk shall provide certified copies of this order to Counsel of record.

Dated: January 25, 2008.

s/ Robert A. Irons
ROBERT A. IRONS, CIRCUIT JUDGE

APPENDIX C — ORDER OF THE MONROE COUNTY COMMISSION ENTERED FEBRUARY 15, 2007

MONROE COUNTY COMMISSION
P.O. Box 350
Union, WV 24983

Order

The Monroe County Commission sitting as a Board of Equalization RE: Mountain America's appeal

Commissioner Michael Shane Ashley moved that the Assessor's appraisals of the properties at issue be affirmed by the Board of Equalization on the basis that the methods of appraisal used by her are within the guidelines provided by law. Entered this 15th day of February 2007.

s/ Oliver Porterfield
Oliver Porterfield, President
Monroe County Commission

s/ Joyce Pritt
Joyce Pritt, Associate Commissioner

s/ Michael Shane Ashley
Michael Shane Ashley, Associate Commissioner

ATTEST: s/ Donald J. Evans
Donald J. Evans, Clerk

APPENDIX D — RELEVANT RULE, CONSTITUTIONAL PROVISIONS, AND STATUTE

Rule 14(f) Disclosure
United States Due Process Clause

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment V

Appendix D

Rule 14(f) Disclosure
United States Equal Protection Clause

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Constitution, Amendment XIX, Section 1

Appendix D

Rule 14(f) Disclosure
Review and Equalization by County Commission

The county commission shall annually, not later than the first day of February, meet for the purpose of reviewing and equalizing the assessment made by the assessor. It shall not adjourn for longer than three days at a time until this work is completed, and shall not remain in session for a longer period than twenty-eight days and shall not adjourn sine die before the fifteenth day of February. At the first meeting, the assessor shall submit the property books for the current year, which shall be complete in every particular, except that the levies shall not be extended. The assessor and his assistants shall attend and render every assistance possible in connection with the value of property assessed by them. The commission shall proceed to examine and review the property books, and shall add on the books the names of persons, the value of personal property and the description and value of real estate liable to assessment which was omitted by the assessor. They shall correct all errors in the names of persons, in the description and valuation of property, and they shall cause to be done whatever else may be necessary to make the valuation comply with the provisions of this chapter. But in no case shall any question of classification or taxability be considered or reviewed. If the commission determine that any property or interest is assessed at more or less than its true and actual value, it shall fix it at the true and actual value. But no assessment shall be increased without giving the property owner at least five days' notice, in writing, and

signed by the president of the commission, of the intention to make the increase. Service upon the property owner shall be sufficient, or upon his agent or attorney in person, or if sent by registered mail to such property owner, his agent, or attorney, at the last known place of abode. If he be not found and have no known place of abode, then notice shall be given by publication thereof as a Class I legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The date of the publication shall be at least five days prior to the increase. When it is desired to increase the entire valuation in any one district by a general increase, notice shall be given by publication thereof as a Class II-O legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this Code, and the publication area for such publication shall be the county. The date of the last publication shall be at least five days prior to the increase in valuation. When an increase is made, the same valuation shall not again be changed unless notice is again given as heretofore provided.

The clerk of the county commission shall publish notice of the time, place and general purpose of the meeting as a Class II legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this Code, and the publication area for such publication shall be the county involved. The expense of publication shall be paid out of the county treasury.

Appendix D

If any person fails to apply for relief at this meeting, he shall have waived his right to ask for correction in his assessment list for the current year, and shall not thereafter be permitted to question the correctness of his list as finally fixed by the county commission, except on appeal to the circuit court. After the county commission completes the review and equalization of the property books, a majority of the commission shall sign a statement that it is the completed assessment of the county for the year; then the property books shall be delivered to the assessor and the levies extended as provided by law.

W. Va. Code §11-3-24

APPENDIX E — QUOTATIONS AND CITATIONS SHOWING MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED AND PASSED ON BY THE STATE COURTS BELOW

Rule 14.1(g)(i)

In their petition to the circuit court, the petitioners alleged, *inter alia*, that the assessments, upheld by the county commission, "violate . . . applicable provisions of the West Virginia and United States Constitutions" and "serve to take the taxpayers' property without due process of law and without affording the taxpayers equal protection of the law." Petition for Appeal to the Circuit Court, ¶ 14., pp. 3-4. In support of such allegations, the petitioners pled that the assessments were "derived by using improper methodologies," "grossly excessive, illegal, unequal, not in proportion to their value, unjust, contrary to requirements of governing statutes and regulations." Id. at ¶¶ 12., 14., p. 3. Finally, in their petition, the petitioners assigned error for the county commission's "permitting assessments of the subject properties in excess of 150% of their true and actual value, while other similar real property in Monroe County is generally and regularly assessed at no more than 5% to 38% of its true and actual value." Id. at ¶ 17., p. 4.

In response to the response to its appeal filed by the county commission, the petitioners moved the circuit court to allow amendment of their pleadings to include additional grounds for claiming a due process violation. Petitioners' Motion to Amend Petition, filed May 30, 2007. Specifically, in that motion, the petitioners cite the

county commission's filing of a response to its appeal "as a party adverse to the taxpayers – instead of an impartial, quasi-judicial body." Id., attached Amended Petition, ¶ 15., p. 4. In addition, the petitioners cited as grounds for their motion the county commission's contention in its response that, except for Mountain America, none of them had perfected timely appeals to the circuit court. Id., at ¶ 16., p. 4. Thus, the petitioners pled, "the County Commission's actions . . . have violated the taxpayers' rights to due process of law under the United States Constitution." Id. at ¶ 17., p. 4.

In addition, the petitioners' amended petition alleged that the county commission "by its intentional actions denied due process to several of the taxpayers as required by the Constitutions of the United States and the State West Virginia," by "filing an Answer herein in a manner which clearly indicates its bias, prejudice, and lack of impartiality . . . [and by] [p]roviding inadequate notice and time to the taxpayers to request hearings and appear . . . before the County Commission." Id., at ¶ 24., pp. 5-6.

In its order denying the petitioners' motion to amend, the circuit court cited its reading of the language of its order allowing the filing of the appeal, as submitted by the petitioners, to the effect that the county commission was directed to file a response. Circuit Court Order, entered July 7, 2007, pp. 1-2. In addition, the circuit court held that petitioners' contention "that the entire statutory appeal structure of tax assessments . . . is unconstitutional" was "a

separate and distinct declaratory action." Id, p. 2. Citing "prejudice to the respondents . . . from an increased time and financial burden to defend against an argument first raised in the midst of the appeal," the circuit court also denied the motion to amend because it "would also greatly broaden the scope of the proceeding and defeat the statutory purpose of achieving an expeditious resolution of tax assessment issues." Id., p. 2.

In its brief to the circuit court in support of its appeal, the petitioners' devoted nearly half of the 32 pages of argument to its Equal Protection claim, citing this Court's unanimous holding in *Allegheny Pittsburgh Coal Company v. County Commission of Webster County, West Virginia*, 488 U.S. 336 (1989) eleven (11) times. Taxpayers'/Petitioners' Brief in Support of Appeal, etc., filed July 5, 2007, pp. 24-39. Another dozen pages of the petitioners' arguments in that brief addressed the multiple aspects of their Due Process claim. Id., pp. 39-50.

Finally, in its order denying the petitioners' appeal on the merits, entered more than half a year later, the circuit court recognized that Mountain America had alleged that its property was not "assessed at the same rate as other adjoining land or comparable land in Monroe County in violation of [the "equal and uniform" taxation provision] of the Constitution of West Virginia." See, Appendix B, p. 2. In its order, the circuit court made no mention of the petitioners' Equal Protection or Due Process claims and the closest it came to acknowledging the standards applicable under *Allegheny Pittsburgh*

(even then without citing this Court's ruling in that case) was to hold that "there is no evidence in the record to show that [the property of others in Monroe County] was intentionally and systematically under valuated as required by West Virginia state law." Id., p. 8.

Nevertheless, at the outset of its opinion, the review of which is being sought here, the court below readily acknowledged that the petitioners "assert that the tax assessments are excessive and unequal . . . in violation of the [petitioners'] rights to equal protection of the law under the United States Constitution. In addition, [petitioners] assert that the process by which they seek review of the assessments before the County Commission violates their rights to due process." Opin., p. 1.

More specifically, before denying the petitioners' Equal Protection claim, the court below recited that "Mountain America asserts that the facts of this case are so similar to [*Allegheny Pittsburgh*] that the circuit court erred in finding that the Assessor's process here did not systematically and intentionally discriminate against it." Opin., p. 37. However, in denying that claim, the court below distinguished the facts of *Allegheny Pittsburgh* because there "the taxpayers showed that the assessor failed to make valuation adjustments to comparable land for more than ten years." Opin., p.40. That was different from the instant matter reasoned the court below because "Walnut Springs is a new development and the 2007 tax year is the first year in which an assessment dispute has arisen. . . . Thus,

assuming a disparity did exist between Walnut Springs assessments and the other properties found to be comparable thereto, the Assessor would necessarily be given the opportunity to make 'seasonable attainment of rough equality' over a short period of time." Opin., pp. 41.

Next, in addressing the petitioners' Due Process claims, the court below, first noted that "[d]espite the fact that these issues were not adjudicated by the circuit court below, we nevertheless may consider them for the first time on appeal to this Court if we determine that the constitutionality issues are central to our disposition in this case." Opin., p. 20. Then, proceeding to consider the Due Process issues raised by the petitioners, the court below, citing its prior holding in *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (2009), held that "[the statute] . . . by which a county commission . . . decides taxpayers' challenges to their property tax assessments, is facially constitutional." Opin., p. 22.

Beyond that, the court below disposed of the petitioners' Due Process claims, based on the county commission's role as an adverse party/respondent in its appeal to circuit court, by holding that "[w]hen balancing the circuit court's interest in acquiring necessary information from the County Commission regarding its review of tax appeals, with the general due process interests of taxpayers . . . we do not believe that this procedure necessarily demonstrates a level of bias

constituting a deprivation of the Appellant's due process." Opin., pp. 26-27. As to the petitioners' contentions about the personal pecuniary interest of the individual members of the county commission in the outcome of the case, the court below held that "to the extent that we have made the determination, . . . , that the Assessor's valuation of Mountain America's residual property was not excessive, we need not address Appellant's argument. . . . Moreover, we seriously question whether a pay increase of $660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute." Opin., p. 27

Finally, as to the petitioners' multi-faceted complaints about the cumulative effect of the various notice and other deficiencies in West Virginia's property tax appeal process, the court below simply found that because "Mountain America had adequate time to hire a real estate appraiser" and "has not explained what evidence it was prevented from presenting at the hearing due to insufficient time," it "has not met its burden to prove . . . facts establishing that the time frame for a tax assessment appeal [under West Virginia law] is so unreasonable and arbitrary as to amount to a denial of due process of law in this case." Opin., p. 29.

Supreme Court, U.S.
FILED
MAR 26 2010
OFFICE OF THE CLERK

No. 09-1007

In The
Supreme Court of the United States

MOUNTAIN AMERICA, LLC, *et al.*,
Petitioners,

v.

DONNA HUFFMAN, ASSESSOR
OF MONROE COUNTY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the West Virginia Supreme Court of Appeals

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Respondents offer the following as the appropriate issues to be considered with respect to the Petition for a Writ of Certiorari:

1. Whether the claims of all but one of the Petitioners were properly disposed of by the Supreme Court of Appeals of West Virginia on non-federal grounds and without reaching a federal question?

2. Whether the claims of the remaining Petitioner, Mountain America, LLC, were also disposed of by the Supreme Court of Appeals of West Virginia on state law grounds independent of the federal questions raised and adequate to support the judgment in favor of the Respondents?

3. In the alternative, whether the Supreme Court of Appeals of West Virginia correctly determined that this case is factually and legally distinguishable from *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989)?

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STATEMENT OF THE CASE

Donna Huffman, the duly elected Assessor of Monroe County, West Virginia, is charged with determining yearly as of the 1st of July the true and actual value of all property located within the County. During the period from July 1, 2006, to January 31, 2007, Ms. Huffman and her staff ascertained the true and actual value of all property, real and personal, subject to *ad valorem* property taxation in Monroe County, West Virginia. As is her duty, the Assessor then assessed the real property at sixty percent (60%) of its fair market value. Transcript of *Hearing before the Monroe County Commission, Donald Evans, Clerk, Oliver Porterfield, President, Michael Shane Ashley, Commissioner, and Joyce Pritt, Commissioner, Sitting as the 2007 Board of Equalization and Review,* Feb. 7, 2007 [hereinafter "Tr."] pp. 68, 70-73. The tax levy is then extended on the assessed value.

Included in this valuation process for the 2007 tax year was a recent development known as Walnut Springs Mountain Reserve. Walnut Springs is a residential development comprised of approximately 1,000 acres located near Union, Monroe County, West Virginia. During the last few years, Mountain America, LLC and its affiliated entities have undertaken to develop Walnut Springs Mountain Reserve into a residential housing development. Mountain America, LLC and its affiliated entities have been selling lots or tracts of property located in the Walnut Springs Mountain Reserve development since September, 2004. Tr. Ex. P-4.

In assessing each property in the Walnut Spring Mountain Reserve development, Ms. Huffman verified

the property owner's name, address, and the description of the real property. Also, after each transfer of real property in Monroe County, Ms. Huffman mailed to the purchaser a "Classification and Sales Confirmation Questionnaire" to confirm that the sales price of the property was the actual market value of the real property transferred. In addition, she visually inspected the real property, determined the property class, recorded the neighborhood code, and determined the infrastructure of the development. Tr. pp. 99-103.

For assessment purposes, West Virginia assessors divide their counties into "neighborhoods" giving consideration to similarities such as parcel size, road, topography, costs, type, and quality of improvements. West Virginia State Tax Department Administrative Notice 2006-16 (January 31, 2006). A "neighborhood" is defined as "a geographical area exhibiting a high degree of homogeneity in residential amenities, land use, economic and social trends, and housing characteristics." *Id.* If a subdivision is unique, it may stand alone as a single neighborhood. *Id.* In Monroe County, West Virginia, there are approximately fifty (50) different neighborhoods for assessment purposes. Tr. p. 97.

During the period of July 1, 2005, to June 30, 2006, the purchase price of the unimproved real property sold by developer Mountain America, LLC and its affiliated entities was significantly higher than any other unimproved real property being sold anywhere else in Monroe County, West Virginia. Tr. p. 96. As a result of the significantly higher consideration being paid for the lots located in Walnut Springs Mountain Reserve and the unique nature of this development,

Donna Huffman, after consulting the West Virginia Department of Tax and Revenue, created a new neighborhood which contained all of the real property located in the Walnut Springs Mountain Reserve development. Tr. pp. 84, 96.

In calculating the 2007 real property assessments for the Walnut Springs Mountain Reserve neighborhood, Ms. Huffman compiled a list of sales prices in the development for the period from July 1, 2005, to June 30, 2006. Next, Ms. Huffman calculated the price per acre for each sale which occurred during the period from July 1, 2005, to June 30, 2006. Tr. pp. 97, 104-06. Once the price per acre for each sale was calculated, Ms. Huffman took the average of all sales during the period of July 1, 2005, to June 30, 2006. *Id.* The unit price per acre was calculated to be $29,236.00, a figure significantly higher than any other real property sales anywhere else in Monroe County. Tr. pp. 97-99.

Ms. Huffman then struck the two highest sales and the two lowest sales and recalculated the average price per acre. Tr. p. 97. The calculated unit price per acre then became $28,502.00. *Id.* Once Ms. Huffman entered the neighborhood information into the real estate mass appraisal software (CAMA) used in West Virginia, she again lowered the assessment per acre to $26,900.00 as an accommodation to the landowners. *Id.* After all of the neighborhood values were entered into the real estate mass appraisal software (CAMA), the software was used to calculate the residual property value for the property still owned by the developer. The residual property value for Walnut Springs Mountain Reserve was calculated to be approximately $5,400 per acre, a figure significantly

lower than the developer's asking price for other acreage previously sold in the development. Tr. pp. 105-06.

Mountain America, LLC, in contravention of W.Va. Code § 39-1-13,[1] failed to place a plat of the Walnut Springs Mountain Reserve development of record in the Office of the Clerk of the County Commission of Monroe County, West Virginia. Tr. p. 97.[2] Walnut

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[1] This statute provides:

> **§ 39-1-13. Duty to record plat or plan of lots.**
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> When any tract or parcel of land within the limits of any county of the State has been or shall be hereafter subdivided into lots by any partition of land or by order of the owner or owners, or his or their agent, or otherwise and any lot or lots have been sold or conveyed, or are offered for sale, from the tract or parcel of land so divided, according to a plat or plan of subdivision, without such plat or plan of subdivision having been filed for record, it shall be the duty of the owner or owners of such tract of land, or his or their agent, authorizing such plat or plan of subdivision of such tract of land to be laid out, to file such plat or plan for record in the office of the clerk of the county court [now county commission] and the office of the county assessor of the county wherein such land so divided is situate.

[2] W.Va. Code § 11-3-1b affords certain property tax relief to developers who have recorded a development plat or designation of land use with the appropriate county commission. Generally speaking, pursuant to this statute, a developer who has so recorded a plat with the county commission receives valuation of its unsold residue based on techniques which do not consider the sale prices of sold lots. The Petitioners admit to this Court that "[n]either Mountain America, nor any other entity or person developing Walnut Springs, has recorded a separate development

Springs Mountain Reserve is, however, subject to that certain "Amended and Restated Declaration of Covenants, Conditions, Restrictions, Reservations, and Easements for Walnut Springs Mountain Reserve, a Residential Home Development Near Union, West Virginia, dated April 8, 2005" ("Restrictive Covenants") which is of record in Monroe County. Tr. pp. 101, 107-08, Ex. A-10. The aforesaid Restrictive Covenants provide that the "lots shall be used for residential and personal recreation purposes; no business, commercial or professional enterprises which regularly attract customers, patrons, or clients shall be permitted or conducted thereon, except as approved by the Developer." Tr. Ex. A-10, p. 12. Consequently, Ms. Huffman assessed the residue of the Walnut Springs development as undeveloped residential property. Tr. pp. 80, 101-02. For the 2007 tax year, all of the real property owned by Mountain America, LLC and its related entities is assessed as "residue," Tr. p. 80, resulting in a lower assessment than would occur if the remaining real property was assessed as individual lots as marketed by the developer.

On or about January 9, 2007, the Assessor provided notice to Mountain America, LLC of an increase of assessment of real property for the forthcoming 2007

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plat or designation of land use." Petition p. 3. By not recording a plat, Mountain America is not eligible for the relief provided by W.Va. Code § 11-3-1b. As such, the Assessor and the County Commission have no obligation to afford such relief to Mountain America or to apply the valuation methodologies of W.Va. Code § 11-3-1b. Nonetheless, the Assessor obviously afforded significant relief to Mountain America by valuing the residue at $5,372.00 per acre when lots have sold for almost five times higher (approximately $30,000.00).

tax year. Tr. Ex. J1. Ms. Huffman provided Mountain America, LLC and the several dozen individual property owners a "Notice of Increase of Assessment" in which all of the landowners were notified of their real property assessments for the 2007 tax year. Specifically, and as required by law, Ms. Huffman notified the landowners that the assessed value of their parcels of real property located in Monroe County, West Virginia, would increase by at least ten percent (10%) from the previous tax year. *Id.*

On February 7, 2007, the Petitioners, by counsel, appeared before the Monroe County Commission sitting as the Board of Equalization and Review in order to protest the 2007 *ad valorem* tax assessments of their properties within Walnut Springs.

The principal evidence offered by the Petitioners at the February 7, 2007 hearing was the testimony and analysis of Todd Goldman. Mr. Goldman is a certified general real estate appraiser. However, Mr. Goldman presented a statistical analysis of a sampling of properties which compared the assessments of properties within Walnut Springs to those of properties located outside of Walnut Springs but within Monroe County.[3] Mr. Goldman also compared

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[3] No other comparable development exists in Monroe County offering amenities such as those touted by Walnut Springs Mountain Reserve. The Petitioners argue that Longview Estates, an older residential development, is a comparable development to Walnut Springs Mountain Reserve. However, Longview Estates is a modest development established in 1984 and has thirty-eight (38) property owners. Tr. Ex. P-2. Real property in Longview Estates has significantly lower market values and the average lot size per owner is significantly smaller. *Id.* Longview Estates has

assessments in the County to recent transactions. Tr. pp. 7-67.

Although Mr. Goldman is a real estate professional, he is not a statistician. His comparison of the assessments to those of other properties in the County is statistical in nature, although he is not qualified to give testimony of a statistical nature. Mr. Goldman testified that he made certain random selections in analyzing the over 12,000 taxable parcels of real estate in Monroe County (Tr. pp. 12-13, 79), although without applying proven statistical analysis it is impossible to know whether his conclusions are accurate to a reasonable degree of statistical certainty or are mere happenstance.

The Petitioners did not ask Mr. Goldman his opinion as to the fair market value of any land in the County (including their own), which opinion Mr. Goldman would have been qualified to give. The Petitioners, rather, chose to have Mr. Goldman testify only as to statistical issues.[4] Tr. pp. 7-67.

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above ground utility lines, and well and septic systems. Tr. pp. 17-18, 39-40. Unlike Walnut Springs Mountain Reserve, Longview Estates does not have "private roads" or underground utility lines. See Tr. Ex. A-10.

[4] Mr. Goldman testified that the property in Walnut Springs was valued by the Assessor at an average value of 152% of the documented recent sales prices. Tr. Ex. P-2. However, Mr. Goldman utilized sales data from the period of September 1, 2004, to July 1, 2006, as the basis of his claim. *Id.* A closer look at the sales data reveals that during the tax period in question, July 1, 2005, to June 30, 2006, the Assessor valued the property in Walnut Springs at an accurate average value of 97.46% of the recent sales prices. Mr. Goldman used sales data from the period

Despite being a certified general real estate appraiser, Mr. Goldman did not appraise any of the Petitioners' properties at issue, or any other property which was the subject of his statistical analysis. In fact, Mr. Goldman was not asked by the Petitioners to appraise their properties. He testified that determining the fair market value of the properties at issue was not his assignment. Tr. p. 60. After a hearing of three hours, the Petitioners presented no evidence as to what their property was actually worth.[5] Further, at the hearing, Mountain America, LLC, the developer of Walnut Springs, did not advise the County Commission of what it had paid for the unsold lots or residue property, the listing price for these unsold lots which were then for sale, or other basic information as to the properties at issue.

Ms. Huffman, the Assessor, testified at the hearing that she worked with the West Virginia Department of Tax and Revenue in creating a new tax "neighborhood" comprising Walnut Springs[6] and in calculating the

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prior to July 1, 2005, in his calculation which skewed the average value.

[5] Further complicating matters, evidence was introduced at the hearing of a "rebate" program used by the developers of Walnut Springs where rebates or discounts were given to some purchasers of lots. However, the deed placed of record in the county stated the consideration paid by the purchaser to the developer without taking into account the "rebate" or discount given. Tr. at pp. 51-54, 106. Neither the Petitioners' expert nor the Assessor was aware of this "rebate" program when performing their assignments. Tr. pp. 54, 106.

[6] The map used by the Assessor for this purpose was provided by a representative of the developer. Tr. pp. 122-23.

assessments with respect to the Petitioners' properties at issue. Tr. p. 84. The Assessor explained the steps she took in arriving at the assessments. Tr. pp. 84-106. Representatives of the West Virginia Department of Tax and Revenue's property tax division were present at the hearing along with their counsel; however, the Department's representatives did not offer any evidence or testimony at the hearing. Tr. p. 3.

The County Commission, after considering the testimony and evidence presented at the hearing, issued a written order affirming the assessments on the basis that the methods of appraisal used by the Assessor were within the guidelines provided by law. See Petition at App. C.

On March 14, 2007, a "Petition for Appeal from Ad Valorem Property Tax Assessments" (the "Circuit Court Petition") was filed with the Circuit Court of Monroe County. On March 14, 2007, Judge Irons of the Circuit Court of Monroe County (the "Circuit Court") signed an Order, which had been prepared by counsel to the Petitioners, directing the Clerk of the Circuit Court to file the Circuit Court Petition along with a record of the proceedings before the County Commission, and further ordered that:

> ...an attested copy of this Order, together with a copy of the Petition, filed herein, be served by the Sheriff upon Donna Huffman, Assessor of Monroe County, West Virginia, and upon H. Rod Mohler, Prosecuting Attorney of Monroe County, West Virginia, *and Paul Papadopoulos, attorney for the Monroe County Commission* and John F. Hussell IV, attorney for the Assessor, *who shall file with this Court, and serve upon*

> *the Petitioners' counsel, within thirty (30) days from the service on her or him, respectively, a response to the Petition filed herewith.*

(emphasis added). See discussion at Appendix B, *infra*. In accordance with the Circuit Court's order prepared by counsel for the Petitioners, both the County Commission and the Assessor filed a response to the Circuit Court Petition.

Three procedural issues were then decided by the Circuit Court. First, on the Petitioners' motion to strike the County Commission's response or answer claiming that the County Commission did not have the right to file a response or any other pleadings in the case before the Circuit Court, the Circuit Court denied the Petitioners' motion noting, in part, that "a review of the record suggests that the Commission's response originates from the Petitioner's own order submitted to this Court and entered on March 14, 2007" and that this Court's opinion in *Allegheny Pittsburgh*[7] "demonstrates that the County Commission is a proper party ...." Order Den. Taxpayers/Pet'rs' Mot. to Strike, Appendix B, *infra*.

The Circuit Court then denied the Petitioners' motion to amend their petition. The Petitioners' proposed amended petition purported to delete all references to the County Commission filing a response and participating in the action, and to assert for the first time that the tax appeals system in West Virginia was inherently flawed. The Circuit Court denied this motion by its Order Denying Taxpayers/Petitioners

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[7] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

Motion to Amend Petition for Appeal, dated July 17, 2007, in part, because the new constitutional claim was "beyond the scope of the original petition and constitutes a separate and distinct declaratory action." Indeed, the Circuit Court with much foresight held:

> Clearly, this assertion of unconstitutionality is a claim most properly raised in an independent action. If advanced in this proceeding, prejudice to the respondents would clearly result from an increased time and financial burden to defend against an argument first raised in the midst of the appeal. It would also greatly broaden the scope of the proceeding and defeat the statutory purpose of achieving an expeditious resolution of tax assessment issues.

See Appendix A, *infra*.

The Circuit Court then ruled that Mountain America, LLC was the only property owner which perfected an appeal to the Circuit Court under W. Va. Code § 11-3-25 and ordered that "this matter shall proceed with Mountain America as the sole appellant" and that "the style shall be amended to delete the term, 'et al.'" Order Granting Mot. to Confirm, Appendix C, *infra*.

With all of the relevant procedural motions decided, the Circuit Court proceeded to address the merits of Mountain America, LLC's appeal. By an Order Denying Plaintiff's Petition For Appeal From Ad Valorem Property Tax Assessments dated January 25, 2008, the Circuit Court affirmed the decision of the County Commission on the grounds that "the Assessor acted in the conformity with the statutory authority,

state regulations, and case law" and "valued the property appropriately within the guidelines prescribed by the West Virginia Code."[8] See Petition at Appendix B. Judge Irons of the Circuit Court further found that "the County Commission properly weighed the evidence before it and did not err in its decision to uphold the assessments made by the Assessor." *Id.*

The Supreme Court of Appeals of West Virginia, in a unanimous opinion, affirmed the Circuit Court as more fully discussed herein. *Mountain America, LLC v. Huffman*, 224 W.Va. 669, 687 S.E.2d 768 (W.Va. 2009); See Petition Appendix A. It is from this opinion of West Virginia's highest court which the Petitioners seek relief.

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[8] The Petitioners incorrectly assert that the Assessor failed to follow and was unfamiliar with certain state guidelines. E.g. Petition pp. 7, 11-14. However, the County Commission, the Circuit Court and West Virginia's highest court found to the contrary.

REASONS FOR DENYING THE PETITION

This Honorable Court should deny the Petition for a Writ of Certiorari ("Petition") for lack of jurisdiction, as the Supreme Court of Appeals of West Virginia, in its unanimous decision: (a) disposed of the claims of all but one of the Petitioners on non-federal grounds and without reaching a federal question, and (b) disposed of the claims of the remaining Petitioner, namely the developer Mountain America, LLC, on state law grounds independent of the federal questions addressed and adequate to support the judgment in favor of the Respondents. In the alternative, should this Court find adequate jurisdiction with respect to any or all of the Petitioners, the Petition should be denied as the Supreme Court of Appeals of West Virginia properly applied both state and federal law principles including this Court's opinion in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*.[9]

I. No "Federal Question" Was Decided Below with Respect to Sixty-One of the Sixty-Two Petitioners

The record in this matter is clear that no "federal question" was decided by the Supreme Court of Appeals of West Virginia with regard to any Petitioner who failed to perfect their appeal to the Circuit Court. Rather, the Supreme Court of Appeals affirmed the Circuit Court of Monroe County's ruling that sixty-one of the sixty-two Petitioners failed to properly perfect an appeal to the Circuit Court on the grounds that

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[9] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

these sixty-one Petitioners failed to comply with jurisdictional appeal procedures required by the West Virginia statutes and Rules of Civil Procedure. See Appendix C, *infra*. The opinion of West Virginia's highest court in this case speaks directly to this point:

> Because we conclude that the circuit court did not err in finding that Mountain America was the only party that properly perfected its appeal before the circuit court, we decline to set aside the circuit court's July 18, 2007, order and we proceed to consider the remaining assignments of error only as they pertain to Mountain America.

687 S.E.2d at 780. Further, the West Virginia court held that, because the circuit court properly dismissed all but one of the Petitioners from the appeal before it, "[t]he other taxpayers were not parties to the tax valuation appeal before the circuit court" and "[a]ccordingly, they continue to remain strangers to this Court." *Id.* at fn. 15.

It has long been held that, on appeal of a decision of the highest state court, where the case was disposed of in the state court before the federal question presented by the pleadings was reached, and such federal question was not and need not have been decided because the state court's decision was based on non-federal grounds, this Court has no jurisdiction. E.g. *Crossley v. City of New Orleans*, 108 U.S. 105, 2 S.Ct. 300, 27 L.Ed. 667 (1883) ("...the case was disposed of before the federal question presented by the pleadings was reached, and that question was not and need not have been decided. Under these circumstances we have no jurisdiction."); *Lynch v.*

People of New York Ex. Rel. Pierson, 293 U.S. 52, 54, 55 S.Ct. 16, 79 L.Ed. 191 (1934) ("It is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction but that its decision of the federal question was necessary to the determination of the cause, *and that it was actually decided*....")(emphasis added).

The opinion of the Supreme Court of Appeals of West Virginia clearly evidences that the claims of sixty-one Petitioners (all other than Mountain America, LLC) were disposed of entirely on state law grounds and before any federal questions raised by said Petitioners were reached.[10] As such, the Respondents respectfully assert that the claims of such sixty-one Petitioners do not fall within the jurisdiction of this Court.

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[10] The above-cited portions of the opinion undoubtedly constitute a "clear statement" under *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), discussed *infra*. See also *Sochor v. Florida*, 504 U.S. 527, 533-34, 112 S.Ct. 2114, 119 L.Ed.2d 326, 337-38 (1992) (jurisdiction was denied where a passage in the Supreme Court of Florida's opinion "indicates with requisite clarity that the rejection of Sochor's claim was based on the alternate state ground that the claim was 'not preserved for appeal'.").

II. The Decision of West Virginia's Highest Court with Respect to the Claims of Petitioner Mountain America, LLC Also Rests on Independent and Adequate State Law Grounds

A. Petitioner Mountain America, LLC Failed to Meet Its Burden of Proof Under West Virginia Law

When a highest state court is presented with and determines both federal and non-federal questions, this Court will not review questions of federal law decided by the state court if the state court's decision rests on state law grounds independent of the federal question and adequate to support the judgment. This Court has stated, in cases where questions of both state and federal law exist, that "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1214 (1983).[11] In addition, "the Long 'plain statement'

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[11] "This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, e.g., Fox Film Corp. v. Muller, 296 US 207, 210, 80 L Ed 158, 56 S Ct 183 (1935); Klinger v Missouri, 13 Wal 257, 263, 20 L Ed 635 (1872). This rule applies whether the state law ground is substantive or procedural. See, e.g., Fox Film, supra; Herndon v. Georgia, 295 US 441, 79 L Ed 1530, 55 S Ct 794 (1935). In the context of direct review of a state court judgment, the independent and adequate state ground doctrine is jurisdictional. Because this Court

rule applies regardless of whether the disputed state-law ground is substantive (as it was in Long) or procedural, as it was in Caldwell v. Mississippi, 472 U.S. 320, 327...(1985)." *Harris v. Reed*, 489 U.S. 255, 261, 109 S.Ct. 1038, 103 L.Ed.2d 308, 316 (1989).[12] The

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> has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory. See Herb v. Pitcairn, 324 US 117, 125-126, 89 L Ed 789, 65 S Ct 459 (1945)("We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion")."

Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640, 655 (1991).

[12] This Court has denied jurisdiction even when the federal question was decided erroneously when state law provided distinct and sufficient grounds to support the judgment of the state court. E.g. *Kennebec R. Co. v. Portland R. Co.*, 81 U.S. 23, 20 L.Ed. 850 (1871) ("Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest even if it had been in error as to the effect of the act of 1857, in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of the judgment of the state court we cannot take jurisdiction, because we could not reverse the case though the Federal question was decided erroneously in the court below, against the plaintiff in error."); *Jenkins v. Loewenthal*, 110 U.S. 222, 3 S.Ct. 638, 28 L.Ed. 129 (1884) ("Either of these defenses, if sustained, bars the action. The second involves a federal question; the other does not. The court in its decree sustained them both and, among other things, found as a fact that the defendants were innocent purchasers for value. As this finding is broad enough to maintain the decree, even though the federal question involved in the other defense was decided wrong, we affirm the decree, without considering that

"independent and adequate state ground" doctrine is at play here, as although the Supreme Court of Appeals of West Virginia found that the rights of Petitioner Mountain America, LLC under federal law were not violated, the West Virginia court also based its decision to uphold the *ad valorem* assessments of Mountain America's residue property on independent and adequate state grounds.

In this regard, the Supreme Court of Appeals of West Virginia, applying well-established West Virginia law, affirmed the tax assessment of Mountain America's residue properties on the grounds that "Mountain America has not sufficiently sustained its burden of proof" because Mountain America "did not offer any evidence of the true and actual value" of its property. 687 S.E.2d at 768. Under West Virginia law, "[a] taxpayer challenging an assessor's tax assessment must prove by clear and convincing evidence that such tax assessment is erroneous." Syl. Pt. 5, *In re Tax Assessment of Foster Foundation's Woodlands Retirement Community*, 223 W.Va. 14, 672 S.E.2d 150 (W. Va. 2008).

As indicated above, Mountain America, LLC is the developer of Walnut Springs. For the tax year at issue, 2007, the Assessor assessed five parcels or tracts of land owned by Mountain America, LLC, and all five of these tracts of land are "residue" in that they

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question or expressing any opinion upon it. *Murdock v. Memphis*, 20 Wall., 590 [87 U.S., XXII., 429], sustains this practice."); *Hale v. Akers*, 132 U.S. 554, 10 S.Ct. 171, 33 L.Ed. 442 (1889); *Hammond v. Johnston*, 142 U.S. 73, 12 S.Ct. 141, 35 L.Ed. 941 (1891).

represent lots or other property which at the time of assessment had not yet been sold by the developer.

The Assessor valued Mountain America's residue at $5,400.00 per acre, which values were confirmed by the County Commission sitting as the Board of Equalization and Review. Tr. at pp. 84, 106. Lots within Walnut Springs Mountain Reserve have sold for an average of $30,481.00 per acre. Tr. at 84. With lots within Walnut Springs selling at an average of $30,481.00 per acre, the Assessor's valuation of Mountain America's residue at only $5,400.00 represents less than twenty percent of the average sale price per acre. The total tax bill (for tax year 2007) with regard to Mountain America's five parcels of residue is approximately $9,500.00.

Perhaps not surprisingly, Mountain America did not offer at the hearing any evidence as to the true and actual value of its residue. As stated earlier, Mountain America's principal witness at the hearing before the County Commission, Todd Goldman, is a certified general real estate appraiser. Tr. at pp. 9, 54-55. However, at no time did Mr. Goldman testify as to what he believed was the "true and actual value" (or fair market value) of any of Mountain America's residue property. Despite being an appraiser, Mr. Goldman appraised nothing at all. Tr. at 60. No appraisals from any source were offered. Further, Mountain America did not introduce any evidence as to what it paid for its residue. In addition, there was no evidence submitted for the County Commission's consideration as to what Mountain America's listing/asking price was for any of this unsold residue property. Clearly, Mountain America, LLC failed to give the County Commission basic, required

information regarding its residue in what appears to be an attempt to avoid the awkward position of a developer claiming that its unsold lots are not worth the prices sold lots have realized. It is understandably against a developer's interests to put evidence into the record in a legal proceeding that its unsold lots are not worth $5,400.00 an acre (as assessed) when other comparable lots in its development have sold for over $30,000.00 an acre.

The burden of proof, however, cannot be met otherwise, and this principle of West Virginia law was applied by West Virginia's high court, which specifically held:

> Mountain America had the burden of proving that the Assessor's valuation was excessive, but it did not offer any evidence of the true and actual value of the residual property. At the hearing before the County Commission, Mountain America did not offer an appraiser's opinion of the value of its residue, any evidence as to what it paid to purchase this residue, or any evidence as to the listing price for any unsold residue property.

687 S.E.2d at 786. In addition, the Supreme Court of Appeals of West Virginia concluded that "[o]ther than disagreeing with the approved values the Assessor obtained by following the appraisal methods prescribed by West Virginia law, Mountain America has not demonstrated by clear and convincing evidence that the Assessor's assessment of its property was incorrect." *Id.* at 787.

The Respondents respectfully submit that the lack of any evidence presented by Petitioner Mountain America, LLC in support of its challenge of the Assessor's valuation of its five tracts of residue property not only easily allowed West Virginia's highest court to find that Mountain America simply failed to meet its burden of proof under State law, but constitutes independent and adequate state law grounds to support a judgment in favor of the Respondents despite any federal questions raised.

B. Mountain America, LLC's Due Process Claims Were Disposed of on Independent and Adequate State Law Grounds

The Supreme Court of Appeals of West Virginia addressed due process[13] issues as they pertain to Petitioner Mountain America, LLC,[14] generally described as: (1) whether the County Commission is a proper party in West Virginia property tax appeals proceedings, (2) whether W.Va. Code § 11-3-24 contains "constricted" time frames for appeal, and (3) whether the burden of proof applied was excessive.

1. Mountain America's contention that the County Commission is not properly a party to property tax appeals in West Virginia is unfounded. West Virginia's highest court noted that "County Commissions have made numerous appearances in

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[13] These claims arise under both the Fifth Amendment, U.S. Const., Amendment V, and Article III, Section 10 of the West Virginia Constitution.

[14] The due process claims of all of the other Petitioners were not addressed by West Virginia's highest court as discussed, *supra*.

these types of appeals before this Court," 687 S.E.2d at 782-3, and cited in its opinion over a dozen reported cases in West Virginia where the appropriate county commission was a party. *Id.* at fn. 19. In addition, it is noted that, in the case of *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*[15], the County Commission of Webster County was clearly a party to that case decided by this Court as evidenced by the case style.

Further, Mountain America's assertion that the County Commission improperly filed an answer or response in the Circuit Court is disingenuous. Mountain America has failed to advise this Court that the County Commission filed an answer or response in the Circuit Court because the County Commission was ordered to do just that by the Circuit Court at the specific request of counsel to the Petitioners who prepared and submitted the order. See Appendix B. Despite the fact that counsel to the Petitioners asked the Circuit Court to require an answer or response of the County Commission, Mountain America surprisingly argues to this Court that, in filing an answer or response, the County Commission shows bias. In addition, the Supreme Court of Appeals noted that "[t]he County Commission's response was necessarily due to the fact that in making a ruling upholding the Assessor's valuation of Mountain America's residual property, the County Commission...was not statutorily required to issue a written opinion...[t]hus, by virtue of requiring a response to a petition for appeal from a County Commission decision, the circuit court was able to

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[15] 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989).

obtain information regarding the County Commission's reasoning in upholding the Assessor's valuation." 687 S.E.2d at 783.

With regard to Mountain America's "direct pecuniary interest" assertions, the Supreme Court of Appeals of West Virginia ruled:

> Furthermore, as to Mountain America's second argument regarding the direct pecuniary interest of the County Commission members in this case, to the extent that we have made the determination, as further discussed below, that the Assessor's valuation of Mountain America's residual property was not excessive, we need not address Appellant's argument that the members of the County Commission received increased salaries as a result of the assessment. Moreover, we seriously question whether a pay increase of $660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute. *See, e.g., Gibson v. Berryhill,* 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488, 500 (1973)(reiterating that "[i]t is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes").

687 S.E.2d at 783. As such, the West Virginia court, in a *Long* "plain statement," clearly disposed of such due process claim on state law grounds and declined to fully address such claim. As shown *supra*, Mountain America's protest of the County Commission's involvement in this matter lacks merit and was

addressed by West Virginia's highest court by the application of West Virginia law.

2. With regard to the "constricted" time frame allegations, the Supreme Court of Appeals of West Virginia held:

> Although Mountain America makes generalized arguments that the notice system set forth in West Virginia Code § 11-3-24 violates due process, it has not advised this Court of how it specifically suffered prejudice as a result of the "constricted" time frame upon appeal to the Board of Equalization and Review. There is no allegation that the hearing afforded Mountain America violated West Virginia Code § 11-3-24. Rather, the hearing afforded was in compliance with statutory requirements. Mountain America, however, has not explained what evidence it was prevented from presenting at the hearing due to insufficient time. In fact, Mountain America had adequate time to hire a real estate appraiser who appears to have performed the analysis asked of him by the Appellants, and who testified on its behalf at the hearing. However, the appraiser did not present any evidence to the County Commission as to what Mountain America paid for the land at issue, and what it expended in developing and improving the land. Mountain America also failed to present any evidence regarding the appraisal of its property which was prepared during the lending process, or to ask the appraiser to appraise its property for submission as evidence. It also failed to present evidence as to the listing price for any of the lots

> it had for sale in Walnut Springs. For these reasons, we find that Mountain America has not met its burden to prove by clear and cogent evidence the requisite facts establishing that the time frame for a tax assessment appeal under West Virginia Code § 11-3-24 is so unreasonable or arbitrary as to amount to a denial of due process of law in this case.

687 S.E.2d at 784. Therefore, applying the principle that a West Virginia taxing statute cannot be found to deny due process of law unless the taxpayer proves "by clear and cogent evidence facts establishing unreasonableness or arbitrariness," 687 S.E.2d at 782 (citing Syl. Pt. 4, *Norfolk & W. Ry. Co. v. Field*, 143 W.Va. 219, 100 S.E.2d 796 (W.Va. 1957) and Syl. Pt. 2, *State ex rel. Haden v. Calco Awning & Window Corp.*, 153 W.Va. 524, 170 S.E.2d 362 (W.Va. 1969)), the West Virginia court found insufficient evidence to support Mountain America's assertions of constricted time frames.

3. With regard to Mountain America's assertion that its due process rights were violated due to the imposition of an excessive burden of proof, the Supreme Court of Appeals of West Virginia below applied a "clear and convincing evidence" standard which the court had set forth in its *Woodlands* opinion. 223 W.Va. 14, 672 S.E.2d 150 (2009). In essence, this claim by Mountain America constitutes an appeal of *Woodlands*. West Virginia's highest court in *Woodlands*, citing *Lavine v. Milne*, 424 U.S. 577, 96 S.Ct. 1010, 47 L.Ed.2d 249 (1976), correctly pointed out that this Court "has admonished that, '[o]utside the criminal law area, where special concerns attend, the locus of the burden of persuasion is normally not

an issue of federal constitutional moment'." 672 S.E.2d at 165. Rather, in *Woodlands* the West Virginia court engaged in a thorough and lengthy analysis of its own previous opinions in tax assessment cases, cases from other states involving taxation which require the same or similar burden of proof and analogous decisions and bodies of law before affirming the "clear and convincing evidence" standard. *Id.* at 160-69.

C. Petitioner Mountain America, LLC's Equal Protection Allegations Are Not Supported by the Factual Record in this Case and Are, at Best, Premature

Petitioner Mountain America, LLC, citing this Court's opinion in *Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, West Virginia*, 488 U.S. 336, 109 S.Ct. 633, 102 L.Ed.2d 688 (1989), also claims a violation of the Equal Protection Clause of the Fourteenth Amendment.[16] However, the facts and legal logic of *Allegheny Pittsburgh* are not as similar to this case as Mountain America asserts. In fact, Mountain America completely misconstrues the *Allegheny Pittsburgh* case. Rather, the Supreme Court of Appeals of West Virginia correctly ruled that the proper application of *Allegheny Pittsburgh* mandates denial of the relief sought by Mountain America, LLC in this case.

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[16] U.S. Const. Amend. XIV.

1. The Properties at Issue are Not "Comparable"

The taxpayers in *Allegheny Pittsburgh* showed that other "comparable" property (coal) in Webster County, West Virginia, was worth substantially the same as their property but that comparable property was "intentionally and systematically" assessed at lower values by the county. *Id.* at Syl. Pts. 2 and 3. In fact, the parties in *Allegheny Pittsburgh* stipulated that the coal properties were indeed "comparable." *Id.* at fn. 3.

Mountain America, in its first, second and third questions presented for review and in an attempt to liken its case with *Allegheny Pittsburgh*, represents to this Court that its properties were "comparable" to neighboring real estate which was assessed at lower values. In fact, many of Mountain America's arguments to this Court require an assumption or finding that the properties are indeed "comparable." However, Mountain America fails to advise this Court that this important question of fact, i.e. whether the land in Walnut Springs Mountain Reserve and that of their neighbors are actually "comparable", was decided by both the Circuit Court and West Virginia's highest court against Mountain America. The Circuit Court reasoned that:

> ... there is not evidence in record to show that such property was intentionally and systematically under valuated as required by West Virginia state law .... Instead, it appears from the record that the property that surrounds the property in question has always sold for prices much below the price of lots in Walnut Springs. This in turn causes the

> adjoining property to sell for and be assessed at a much lower rate. Although the record is not clear as it might be, it appears that the lots contained in Walnut Springs have been developed and contain many amenities not available on the adjoining lands and are only available in the new neighborhood, thus causing the adjoining lands to sell for much lower prices and the resulting assessments.

Order Denying Plaintiff's Petition for Appeal from Ad Valorem Property Tax Assessments dated January 25, 2008; See Petition App. B. Similarly, the Supreme Court of Appeals held:

> Below, Mountain America was not able to show that the properties within Walnut Springs were in fact "comparable" to surrounding properties. In fact, rather than being comparable, Walnut Springs lots were touted to be unique, superior, and more valuable than surrounding properties. The higher sales prices for Walnut Springs property are likely due to the fact that the lots contain amenities only available in this particular neighborhood. Herein, the record before the circuit court showed that the property that surrounded the property in question has always sold for prices much below the price of lots in Walnut Springs, and thus, the lower sales prices cause the adjoining property to be assessed at a much lower rate.

687 S.E.2d at 788. Property in Walnut Springs Mountain Reserve, enhanced by private roads, large lots, underground utilities, voluminous restrictive covenants which for example call for an "Architectural

Design Review Board" and contain "Equestrian Provisions" which mandate the manner of care, feeding, visitation, pasturing and fencing of horses within the development,[17] has not been shown or determined as a finding of fact to be "comparable" to other property in Monroe County as Mountain America asserts. The West Virginia courts properly made this finding of fact based on the record of this case.[18]

2. Unlike the Assessor in *Allegheny Pittsburgh*, The Assessor of Monroe County Followed West Virginia Law

In *Allegheny Pittsburgh,* the Webster County Assessor was portrayed by this Court as a renegade who acted "on her own initiative" to apply the tax laws in an unconstitutional manner and "contrary to that of the guide published by the West Virginia Tax Commission as an aid to local assessors ..." 488 U. S. at 346. Here, the Assessor of Monroe County did not act on her own initiative or contrary to guidance of the Department of Tax and Revenue. Rather, she worked directly with the Department of Tax and Revenue when compiling the assessments at issue, Tr. p. 84, and complied in all respects with West Virginia law. The Supreme Court of Appeals found that the Assessor

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[17] Tr. Ex. A-10.

[18] This finding supports the Assessor's designation of Walnut Springs as a neighborhood pursuant to Administrative Notice 2006-16 (W.Va. State Tax Dept. January 31, 2006).

had not abused her discretion[19] and the Circuit Court held:

> After reviewing all the relevant evidence, listening to the arguments of both parties and consulting the pertinent legal authorities, the Court is of the opinion that the Assessor acted in conformity with the statutory authority, state regulations, and case law pertaining to her position as a county Assessor and in doing so, she valued the property appropriately within the guidelines prescribed by the West Virginia Code.

Petition App. B. The actions of the Assessor here were contrary to the actions of the Webster County Assessor in *Allegheny Pittsburgh*. As such, the facts and circumstances of this case are further distinguished.

3. Petitioner Mountain America's Equal Protection Arguments are, at Best, Premature

In *Allegheny Pittsburgh*, this Court held:

> As long as general adjustments are accurate enough over a short period of time to equalize the differences in proportion between the assessments of a class of property holders, the Equal Protection Clause is satisfied. Just as that Clause tolerates occasional errors of state law or mistakes in judgment when valuing property for tax purposes ... [citation omitted]

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[19] 687 S.E.2d at 787.

> ... it does not require immediate general adjustment on the basis of the latest market developments. In each case, the constitutional requirement is the seasonable attainment of a rough equality in tax treatment of similarly situated property owners.

488 U. S. at 344. Walnut Springs Mountain Reserve is a new development and the 2007 tax year at issue here is the first in which a dispute has arisen.[20] Even if this Court adopts Mountain America's contention that the Walnut Springs properties are "comparable" and that disparate treatment may have occurred, the rule of law set forth in *Allegheny Pittsburgh* does not afford Mountain America relief at this time. Mountain America, in essence, asks this Court to afford "immediate general adjustment" of its taxes while denying Monroe County the opportunity, as articulated in *Allegheny Pittsburgh*, to make "seasonable attainment of a rough equality."[21] Rather, the Supreme Court of Appeals understood and

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[20] To the contrary, in *Allegheny Pittsburgh*, the taxpayers showed that the assessor had failed to make valuation adjustments to comparable land for "more than 10 years." 488 U.S. at 344.

[21] The record in this case shows that Ms. Huffman, since taking office, has submitted a detailed plan of action to the State Property Valuation Training and Procedures Committee (PVC) to address any deficiencies in assessment of real property in Monroe County. Tr. pp. 91-95. In fact, the State's final ratio study with respect to Monroe County's appraisals of real property for tax year 2006 showed full compliance by Ms. Huffman. Tr. Ex. A-8. If the Petitioners intend to challenge whether West Virginia's myriad of statutes, regulations and procedures designed to insure equal valuations statewide are flawed, the record in this case is totally inadequate for that purpose.

properly applied this Court's mandate in *Allegheny Pittsburgh*[22] when holding:

> As a matter of practicality, not all property in the county can be revalued at one time. For this reason, West Virginia Code § 11-1C-1 requires a county assessor to revalue every parcel in the county every three years. Walnut Springs is a new development and the 2007 tax year is the first year in which an assessment dispute has arisen. Thus, assuming a disparity did exist between the Walnut Springs assessments and other properties found to be comparable thereto, the Assessor would necessarily be given the opportunity to make "seasonable attainment of a rough equality" over a short period of time. Accordingly, we affirm the circuit court's ruling finding that Mountain America failed to show that other such property was intentionally and systematically under valuated.

687 S.E.2d 789. Review of the West Virginia court's decision is not warranted here as this Court has given guidance on this issue and it has been followed.

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[22] The West Virginia court also applied West Virginia law that "[t]he Equal and uniform clause of Section 1 of Article X of the West Virginia Constitution *more than* requires a taxpayer whose property is assessed at true and actual value to show the fact that other property is valued at less than true and actual value.... To obtain relief, he must prove that the undervaluation was intentional and systematic." 687 S.E.2d at Syl. Pt. 11.

CONCLUSION

As discussed above, the Petitioners' claims contain decisive jurisdictional defects. In the alternative, should this Court find adequate jurisdiction with respect to any of the Petitioners' claims, the unanimous opinion of the Supreme Court of Appeals of West Virginia in this matter is consistent with West Virginia and federal law and this Court's previous opinion in *Allegheny Pittsburgh*. As such, the Respondents, Donna Huffman, the Assessor of Monroe County, West Virginia, and the Monroe County Commission, respectfully request that this Honorable Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

CASE NO. 07-C-30

[Dated July 17, 2007]

IN RE:	THE 2007 ASSESSMENTS OF THE PROPERTY OF MOUNTAIN AMERICA LLC, ET AL.	))))

ORDER DENYING TAXPAYERS/ PETITIONERS MOTION TO AMEND PETITION FOR APPEAL

On June 18, 2007, the above styled matter was brought on for hearing. The Taxpayers/Petitioners appeared by counsel Robert Kiss, Esq., and Michael Caryl, Esq., of Bowles Rice LLP. The Monroe County Assessor (hereinafter referred to as "Assessor") appeared by counsel, John Hussell, IV, Esq., and Katie Hoffman, Esq., of Dinsmore and Shohl, LLP. The Monroe County Commission (hereinafter referred to as "County Commission") appeared by counsel David Higgins, Esq., and Paul Papadopoulos, Esq., of Robinson and McElwee PLLC.

The Taxpayers/Petitioners have filed a Motion to Amend their original Petition. The motion alleges that the response of the County Commission and the

Assessor encompass facts which did not exist and events which had not occurred at the time the original petition was filed. The motion sets forth three grounds of argument:

- By filing a response, the County Commission demonstrates an inherent bias and conflict of interest that violate petitions due process rights granted by section 1, Article X of the Constitution of WV;
- The property tax appeals process itself unconstitutionally violates due process of law; and
- The motion to amend should be liberally construed under Rule 15 of the Rules of Civil Procedure.

The first ground, concerning the County Commission's response, originates from the Taxpayers/Petitioners own order submitted to this Court and entered on March 14, 2007. The pertinent language of that order states:

> It is further ordered and adjudged that an attested copy of this Order, together with a copy of the Petition, filed herein, be served by the Sheriff on Donna Huffman, Assessor of Monroe County, West Virginia, and upon H. Rod Mohler, Prosecuting Attorney of Monroe County, West Virginia, **and Paul Papadopoulos, attorney for the Monroe County Commission** and John V. Hussell, IV, attorney for the Assessor, **who shall file with this Court and serve upon the Petitioners' counsel within thirty (30) days from the service on her or him respectively, a**

response to the Petition filed herewith. (emphasis added).

The second argument postulated in the Motion to Amend is that the entire statutory appeal structure of tax assessments and the Board of Equalization is unconstitutional. This argument is clearly beyond the scope of this proceeding as an appeal from a decision of the Board of Equalization. It is also beyond the scope of the original petition and constitutes a separate and distinct declaratory action. Furthermore, the West Virginia Supreme Court of Appeals has stated "The liberality allowed in the amendment of pleadings pursuant to Rule 15(a) of the West Virginia Rules of Civil Procedure does not entitle a party to be dilatory in asserting claims." Syllabus Point 3 (in part), State ex rel. Vedder v. Zakaib, 217 W.Va. 528, 618 S.E.2d 537 (2005). Clearly, this assertion of unconstitutionality is a claim most properly raised in an independent action. If advanced in this proceeding, prejudice to the respondents would clearly result from an increased time and financial burden to defend against an argument first raised in the midst of the appeal. It would also greatly broaden the scope of the proceeding and defeat the statutory purpose of achieving an expeditious resolution of tax assessment issues.

The Petitioners third argument that Rule 15 of the West Virginia Rules of Civil Procedure holds that the right to amend should be liberally construed. The West Virginia Supreme Court of Appeals has stated "The purpose of the words 'and leave to amend shall be freely given when justice so requires' in Rule 15(a) is to secure an adjudication on the merits of the controversy as would be secured under identical

factual situations in the absence of procedural impediments; therefore, motions to amend should always be granted under Rule 15 when: (1) the amendment permits the presentation of the merits of the action; (2) the adverse party is not prejudiced by the sudden assertion of the subject of the amendment; and (3) the adverse party can be given ample opportunity to meet the issue. Syllabus Point 3, Rosier v. Garron, Inc., 156 W.Va. 861, 199 S.E.2d 50 (1973); Syllabus Point 6, Berry v. Nationwide Mut. Fire Ins. Co., 181 W.Va. 168, 381 S.E.2d 367 (1989); Syllabus Point 8, McDowell County Bd. of Educ. v. Stephens, 191 W.Va. 711, 447 S.E.2d 912 (1994).

Therefore, this Court finds that the proposed amended complaint would prejudice the adverse party. The amendment seeks to pursue a declaratory action on the constitutionality of the property tax appeal process. This is a matter of statewide interest. This claim is more properly advanced as an independent proceeding. It would obviously delay resolution of this matter, require additional necessary parties to be added, and would defeat the statutory goal of an expeditious resolution of tax assessment issues.

Accordingly, it is hereby **ORDERED** and **ADJUDGED:**

1. The Taxpayer's Motion to Amend its Petition appealing a decision of the Board of Equalization is **DENIED.**

2. The Circuit Clerk shall distribute certified copies of this order to counsel of record.

Dated: July 17, 2007

/s/ Robt. A. Irons

ROBERT A. IRONS, CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF MONROE, TO-WIT:

I, JULIA L. LIGHT, Clerk of the Circuit Court of Monroe County, do hereby Certify that the foregoing and hereto annexed writing is a true copy of Order As found of record in this office in **Civil Order Book No.** 24, page 216.
Given under my hand and seal of said Court this the 18 day of July, 2007.

/s/ Julia L. Light Clerk

APPENDIX B

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

CASE NO. 07-C-30

[Dated June 22, 2007]

IN RE:	THE 2007 ASSESSMENTS OF THE PROPERTY OF MOUNTAIN AMERICA LLC, ET AL.	))))

ORDER DENYING TAXPAYERS/ PETITIONERS MOTION TO STRIKE THE RESPONSE FILED ON BEHALF OF THE COUNTY COMMISSION OF MONROE COUNTY

On June 18, 2007, the above styled matter was brought on for hearing. The Taxpayers/Petitioners appeared by counsel Robert Kiss, Esq., and Michael Caryl, Esq., of Bowles Rice LLP. The Monroe County Assessor (hereinafter referred to as "Assessor") appeared by counsel, John Hussell, IV, Esq., and Katie Hoffman, Esq., of Dinsmore and Shohl, LLP. The Monroe County Commission (hereinafter referred to as "County Commission") appeared by counsel David Higgins, Esq., and Paul Papadopoulos, Esq., of Robinson and McElwee PLLC.

The Taxpayers/Petitioners moves this Court to strike the County Commission's response to their petition. The Taxpayers/Petitioners argue that an inherent bias exists in the Board of Equalization and that the County Commission cannot be a proper party to their petition. However, a review of the record suggests that the Commission's response originates from the Petitioner's own order submitted to this Court and entered on March 14, 2007. The pertinent language of that order states:

> It is further ordered and adjudged that an attested copy of this Order, together with a copy of the Petition, filed herein, be served by the Sheriff on Donna Huffman, Assessor of Monroe County, West Virginia, and upon H. Rod Mohler, Prosecuting Attorney of Monroe County, West Virginia, **and Paul Papadopoulos, attorney for the Monroe County Commission** and John V. Hussell, IV, attorney for the Assessor, **who shall file with this Court and serve upon the Petitioners' counsel within thirty (30) days from the service on her or him respectively, a response to the Petition filed herewith.** (emphasis added).

Furthermore, a United States Supreme Court Case, ironically arising from an assessment appeal in West Virginia, demonstrates that the County Commission is a proper party to the petition. *See* Allegheny Pittsburgh Coal Co. v. County Commission of Webster County, W. Va., 488 U.S. 336 (1989).

Accordingly, it is hereby **ORDERED** and **ADJUDGED:**

1. The Taxpayer's Motion to Strike the Response of the Monroe County Commission is **DENIED** because the order filing Appeal required a response from the County Commission, and because case law recognizes the County Commission as a necessary party to appeals from the Board of Equalization.

2. The Circuit Clerk shall distribute certified copies of this order to counsel of record.

Dated: June 22, 2007

/s/ Robt. A. Irons

ROBERT A. IRONS, CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF MONROE, TO-WIT:

I, JULIA L. LIGHT, Clerk of the Circuit Court of Monroe County, do hereby Certify that the foregoing and hereto annexed writing is a true copy of Order As found of record in this office in **Civil Order Book No.** 24, page 211.
Given under my hand and seal of said Court this the 18 day of July, 2007.

/s/ Julia L. Light Clerk

APPENDIX C

IN THE CIRCUIT COURT OF MONROE COUNTY, WEST VIRGINIA

CASE NO. 07-C-30

[Dated July 17, 2007]

IN RE:	THE 2007 ASSESSMENTS OF THE PROPERTY OF MOUNTAIN AMERICA LLC, ET AL.	))))

ORDER GRANTING COUNTY COMMISSION'S MOTION TO CONFIRM MOUNTAIN AMERICA, LLC, AS THE SOLE PROPERTY OWNER WHICH HAS PERFECTED AN APPEAL

On June 18, 2007, the above styled matter came on for hearing on a motion filed by the Monroe County Commission, seeking clarification of the names of the Appellees herein. The Taxpayers/Petitioners appeared by counsel Robert Kiss, Esq., and Michael Caryl, Esq., of Bowles Rice LLP. The Monroe County Assessor (hereinafter referred to as "Assessor") appeared by counsel, John Hussell, IV, Esq., and Katie Hoffman, Esq., of Dinsmore and Shohl, LLP. The Monroe County Commission (hereinafter referred to as "County Commission") appeared by counsel David Higgins, Esq., and Paul Papadopoulos, Esq., of Robinson and McElwee PLLC.

The County Commission has moved to confirm Mountain America, LLC, as the sole taxpayer perfecting an appeal. The County Commission specifically charges that the Petition for Appeal does not set forth with particularity which taxpayers are appealing, other than Mountain America, and that because no other taxpayer was identified, only Mountain America perfected an appeal and the thirty day period to appeal a Board of Equalization decision to Circuit Court has passed, as to any other taxpayers.

In this matter, neither the initial order, the petition, nor the civil information case sheet reflects the identity of any petitioner other than Mountain America, LLC. Taxpayers/Petitioners argue that "et al." after Mountain America, LLC, is inclusive of all petitioners at the Board of Equalization hearing and that the parties had previously stipulated for the purpose of that hearing, that counsel for Taxpayers/Petitioners would represent all persons protesting their tax assessment. Taxpayers/Petitioners further contend that this sufficiently identifies the Appellees herein, without the necessity of further identifying individual taxpayers in the Petition for Appeal, or the tax parcels in question.

Rule 1 of the West Virginia Rules of Civil Procedure provide that "these rules govern the procedure in all trial courts of record, in all actions, suits or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity, with the qualifications and exceptions stated to Rule 81." Rule 81 does not contain an exception as to appeals from Boards of Equalization.

Rule 10 of the Rules of Civil Procedure requires that "in the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties." Rule 20 allows joinder of multiple parties. The Petition filed in this proceeding is silent to the names of the Appellants, other than Mountain America, LLC.

Persuasive authority of a neighboring jurisdiction has held that a petition for appeal which names only one of multiple complainants, appeals only the cause of the complainant named and is "wholly insufficient as a petition for an appeal by any person other than the person named." Carlton v. Paxton, 14 Va.App. 105, 415 S.E.2d 600 (Va.App. 1992), *citing* Challice v. Clark, 163 Va. 98, 102, 175 S.E. 770, 770-71 (1934)). In Challice, the petition for an appeal commenced by stating, "Your petitioner, Nettie O. Challice, et als, respectfully represents that they are aggrieved by this decree." The holding was that Nettie O. Challice was the only petitioner named in the Petition, and that it must be treated as a petition by her only. The petition was signed "Nettie O. Challice, et als, by John G. Challice, attorney."

Under the West Virginia Rules of Civil Procedure, the initial pleading in an appeal from the Board of Equalization must contain the names of the parties. This is necessary so that the court record clearly reflects who is appealing the decision of the Board of Equalization. To this date, some four months after the appeal was filed, it is impossible to pick up the court file and determine the name of the Appellants or the tax parcels in question. A review of the record of the

hearing before the Board of Equalization reveals the names of at least some of the persons contesting their assessments, but this is insufficient for purposes of West Virginia Rules of Civil Procedure Rule 10. The burden here is clearly on the person seeking to appeal, to identify the names of the persons seeking to appeal with some particularity in the initial filings in circuit court. This Court recognizes that the statutory procedure in tax appeals is somewhat archaic, however when the appeal reaches circuit court, it is governed by the Rules of Civil Procedure which clearly requires the names of the parties in the initial filing.

Accordingly, it is hereby **ORDERED** and **ADJUDGED:**

1. The County Commission's Motion to Confirm Mountain America, LLC, as Sole Property Owner that has Perfected an Appeal shall be **GRANTED,** and this matter shall proceed with Mountain America as the sole appellant. The style shall be amended to delete the term, "et al."

2. The Circuit Clerk shall distribute certified copies of this order to counsel of record.

Dated: July 17, 2007

/s/ Robt. A. Irons

ROBERT A. IRONS, CIRCUIT JUDGE

STATE OF WEST VIRGINIA
COUNTY OF MONROE, TO-WIT:

I, JULIA L. LIGHT, Clerk of the Circuit Court of Monroe County, do hereby Certify that the foregoing and hereto annexed writing is a true copy of Order As found of record in this office in **Civil Order Book No.** 24, page 213.
Given under my hand and seal of said Court this the 18 day of July, 2007.

/s/ Julia L. Light Clerk

MOTION FILED

MAR 2 6 2010

No. 09-1007

IN THE

Supreme Court of the United States

MOUNTAIN AMERICA, LLC, *et al.*,
Petitioners,

v.

DONNA HUFFMAN,
ASSESSOR OF MONROE COUNTY *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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March 26, 2010

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IN THE

Supreme Court of the United States

No. 09-1007

MOUNTAIN AMERICA, LLC, *et al.*,
Petitioners,

v.

DONNA HUFFMAN,
ASSESSOR OF MONROE COUNTY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals of West Virginia

MOTION FOR LEAVE TO FILE BRIEF OF THE WEST VIRGINIA MANUFACTURERS ASSOCIATION IN SUPPORT OF PETITIONER

Amicus curiae West Virginia Manufacturers Association ("WVMA") respectfully requests leave of this Court to file the following Brief in support of the petition for certiorari in this matter. In support of its motion, WVMA states as follows:

1. WVMA requested the consent of both petitioners and respondents to file its *amicus curiae* brief in this case. Petitioners granted their consent in writing. Petitioners' written consent has been filed with the Court. Respondents refused to consent.

2. WVMA, a non-profit organization, has represented the interests of the manufacturing industries in West Virginia for nearly a century. WVMA

currently has 150 member companies, which employ 25,000 individuals in the state. WVMA engages in policymaking, educates and trains its members, and advocates for them in court.

3. WVMA regularly participates as *amicus curiae* in cases that address issues of importance to its members. For instance, WVMA filed an *amicus* brief in the West Virginia Supreme Court of Appeals in *Bayer MaterialScience, LLC* v. *State Tax Commissioner*, 672 S.E.2d 174 (W. Va. 2008) (per curiam), a decision in which the court below previously concluded that the system challenged here comports with the Due Process Clause of the Fourteenth Amendment.

4. This case is critical to WVMA's membership. WVMA's members own property in West Virginia and pay a substantial portion of the tax revenues collected by counties in West Virginia. Like petitioners here, when WVMA's members conclude that the valuation of their property upon which their taxes are based is excessive or erroneous, the Due Process Clause entitles them to a meaningful hearing before a tribunal that does not suffer from an inherent conflict of interest.

5. WVMA's brief focuses on two of the questions petitioners have presented. Those questions pertain to the county commissioners' pecuniary interest in the property valuation cases they decide, as well as the commissions' inherent conflict of interest between their executive role in administering the counties' finances and their responsibility to adjudicate cases in which a decision favorable to the taxpayer will deprive the commissioners of the very funds upon which they depend as executives. WVMA's brief shows that the decision below upholding West Virginia system for resolving these disputes conflicts

directly and irreconcilably with this Court's well-established due process precedents. *See, e.g.*, *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2260-2261, 2263 (2009); *Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973); *Ward* v. *Monroeville*, 409 U.S. 57, 60-62 (1972); *Tumey* v. *Ohio*, 273 U.S. 510, 522, 533-34 (1927). Under the rules established by the court below, taxpayers in West Virginia that attempt to challenge the valuation of their property can no longer insist on their basic constitutional right to a meaningful hearing before an impartial tribunal.

6. WVMA submits that its perspective on the requirements of the Due Process Clause as it relates to West Virginia's system for resolving property tax valuation disputes will assist this Court in determining whether to grant review of the Petition. Therefore, WVMA respectfully moves the Court to grant this Motion and permit the filing of the following Brief.

Respectfully submitted,

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March 26, 2010

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QUESTIONS PRESENTED

1. Whether the Due Process Clause prohibits County Commissioners from deciding Petitioners' challenge to their property tax assessments where the County Commissioners have a substantial financial interest in the outcome of that challenge?

2. Whether the Due Process Clause prohibits County Commissioners from deciding Petitioners' challenge to their property tax assessments where the County Commissioners are executive officers of the county responsible for ensuring that the county has sufficient tax revenues?

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INTEREST OF *AMICUS CURIAE*

The West Virginia Manufacturers Association ("WVMA") is a non-profit organization that has been continuously representing the interests of the manufacturing industries in West Virginia since 1915. Currently WVMA's membership consists of 150 member companies employing 25,000 men and women in West Virginia.[1] WVMA engages in policy-making, educates and trains its members, and provides access to experts in areas including tax, environmental protection, and employment. WVMA also advocates in court on behalf of its members, including as an *amicus curiae*. *See, e.g.*, *Bayer MaterialScience, LLC* v. *State Tax Comm'r*, 672 S.E.2d 174 (W. Va. 2008) (per curiam); *State ex rel. Chemtall Inc.* v. *Madden*, 655 S.E.2d 161 (W. Va. 2007); *Childress* v. *City of Richmond*, 134 F.3d 1205 (4th Cir. 1998) (en banc) (per curiam).

The issues presented in the Petition are especially important to WVMA and its members. WVMA's members represent a sizable portion of West Virginia's economy, and therefore have a significant interest in ensuring that the state's system for property taxation is fair and complies with the

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief, and counsel of record for petitioners has consented to its filing. Petitioners' letter of consent has been filed with the Clerk. Because counsel for respondents refused to consent to this filing, the brief is filed upon motion. Pursuant to Rule 37.6, *amicus curiae* WVMA states that no counsel for any party authored this brief in whole or in part, and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation and submission of this brief.

requirements of the United States Constitution and the Due Process Clause.

In particular, WVMA focuses its brief on the Questions Presented by Petitioners that concern the conflict between the Due Process Clause's requirement or a fair and impartial judge and decision of the court below approving West Virginia's system for valuation of property taxes. *See* Pet. i.-ii (Questions 4 & 5).

SUMMARY OF ARGUMENT

The decision of the West Virginia Supreme Court of Appeals allows county commissioners laboring under direct and clear conflicts of interests to adjudicate challenges to property tax assessments. That ruling conflicts with this Court's decision in *Caperton* v. *A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009), and the long line of this Court's decisions setting forth the requirements of the Due Process Clause of the Fourteenth Amendment. The decision below holds that West Virginia law requiring county commissions to adjudicate challenges to property valuations that serve as the basis for the imposition of property taxes does not violate the Due Process Clause. Pet. App. 24a-36a. That decision cannot be reconciled with this Court's precedents explaining that that due process requires an impartial decision-maker.

First, as the court below acknowledged, Pet. App. 29a, 33a, petitioners presented to the court below the issue whether their due process rights were violated because the West Virginia county commissioners who adjudicated their property valuation disputes have a "'direct, personal, substantial, pecuniary interest'" in the outcome of those cases. *Caperton*, 129 S. Ct. at 2259. Under West Virginia law, the salaries of commissioners are based on the

assessed value of all property within the county. *See* W. Va. Code §§ 7-7-3, 7-7-4; *see* Pet. 10, 26-27. As a result, county commissioners have a direct financial incentive to increase the assessed value of property within the county. This financial incentive in property valuation cases is irreconcilable with this Court's due process precedents.

Second, petitioners also presented the issue whether West Virginia's property valuation system violates due process because the county commissioners have a dual role within West Virginia's system of government. Pet. App. 25a-29a. Petitioners explained that county commissioners serve an executive function within local government, and chief among their responsibilities is control over the county's finances. In this capacity, the county commissions have an overwhelming financial incentive that creates the "tempt[ation] to disregard neutrality" in hearing challenges to property valuations. *Caperton*, 129 S. Ct. at 2260. The decision below rejecting petitioners' due process challenge conflicts with this Court's holdings and those of the First, Sixth and Seventh Circuits, and several other lower courts.

STATEMENT OF THE CASE

As shown below, the Court should grant review because the decision below conflicts with this Court's decisions explaining the requirements of the Due Process Clause. As explained by petitioners, the direct pecuniary interest of the individual commissioners of the Monroe County Commission in the outcome of this litigation and the conflict-of-interest created by the executive responsibilities of these county commissioners prohibits them from deciding challenges to property tax assessments.

A. The Requirements Of The Due Process Clause.

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. In *Caperton*, this Court explained that "'[a] fair trial in a fair tribunal is a basic requirement of due process.'" 129 S. Ct. at 2259 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)).[2] As a result, "[n]o man can be a judge in his own case,'" and no judge "'is permitted to try cases in where *he has an interest in the outcome.*'" *Id.* at 2261 (emphasis added). To implement the requirements of Due Process, the Court has insisted on "objective standards that do not require proof of actual bias." *Id.* at 2263 (collecting cases). As a result, "[d]ue process 'may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.'" *Id.* at 2265 (quoting *Murchison*, 349 U.S. at 136).

A judge's financial interest in the outcome of a case is the prototypical violation of due process. *See Caperton*, 129 S. Ct. at 2259-60. Thus, due process is violated where the tribunal has "a direct, personal, substantial pecuniary interest" in a case. *Tumey* v. *Ohio*, 273 U.S. 510, 523 (1927); *accord Gibson* v. *Berryhill*, 411 U.S. 564, 579 (1973) (striking down administrative board procedure for licensing optometrists because optometrists who served on the

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[2] *Accord Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980) (due process requires "neutrality" and reflects "the powerful and independent constitutional interest in fair adjudicative procedure"); *Ward* v. *Monroeville*, 409 U.S. 57, 62 (1972) (due process requires "a neutral and detached judge in the first instance").

board had a pecuniary interest of "sufficient substance" that they could not preside).

A direct pecuniary interest, however, does not exhaust the limits of due process in this context. *See Caperton*, 129 S. Ct. at 2260. Instead, the Due Process Clause prohibits "[e]very procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between" the litigants. *Tumey*, 273 U.S. at 532. As a result, "[a] situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involves a lack of due process of law." *Id.* at 534.

For example, in *Ward*, this Court invalidated on due process grounds a system in which the mayor also served as a judge because of the "'possible temptation'" that his "executive responsibilities for village finances may make him partisan to maintain the high level of contribution [to those finances] from the mayor's court." 409 U.S. at 60; *accord Caperton*, 129 S. Ct. at 2260 (following *Ward*); *Tumey*, 273 U.S. at 522, 533-34.

B. West Virginia's County Commissions.

Two aspects of West Virginia's County Commission system are implicated in this case: the role played by county commissioners in the fiscal governance of individual counties and the manner in which the salaries of county commissioners is determined.

First, under West Virginia law, County Commissions are charged with administering the "fiscal affairs of their counties" and "lay[ing] and disburs[ing] the county levies." W. Va. Const. art. IX, § 11. By statute, county commissions "supervise the general management of the fiscal affairs and business

of each county." W. Va. Code § 7-1-5. As the West Virginia Supreme Court of Appeals has ruled, county commissions "are the central governing body of the county." *State ex rel. Dingess* v. *Scaggs*, 195 S.E.2d 724, 725 (W. Va. 1973).[3] The county commission presiding over West Virginia's most populous county has explained, "[t]he primary function of the County Commission is budget development and management, overseeing purchasing for the county, [and] management of county assets."[4]

The executive functions of county commissions are limited by the amount of taxes that the county is able to levy and collect. *See, e.g., State ex rel. Lambert v. Cortellessi*, 386 S.E.2d 640, 642 & n.2 (W. Va. 1989). A "dwindling tax base" in a county decreases the funds available to the county commission which, in turn, causes the county commission to substantially reduce budgets and cut county employees.[5] Thus, "[t]he *ad valorem* tax is the most fundamental tax imposed upon the citizens of this State to fund local government." *State ex rel. County Comm'n* v. *Cooke*, 475 S.E.2d 483, 491 (W. Va. 1996) (citation omitted). In 2007, for instance, property taxes comprised 77.4% of the tax revenue to support local governments in West Virginia.[6]

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[3] *See* W. Va. Code §§ 7-1-3, 7-1-5 (setting forth jurisdiction and duties of the commissions); *see also* W. Va. Const. art. IX, § 10 (providing for the popular election of commissioners).

[4] Kanawha County Comm'n, *Mission Statement*, *at* http://www.kanawha.us/commission/.

[5] *Cf. Killen* v. *Logan County Comm'n*, 295 S.E.2d 689, 712 (1982) (Neely, J., dissenting) ("The pressures on the county commissions are probably such that they will quickly use all money available to them.").

[6] *See* http://www2.census.gov/govs/estimate/07slsstab1b.xls.

County commissions, in their executive role, control how tax collections are budgeted and oversee the collection of such taxes. West Virginia law imposes a "duty" on "county commissions to assist the tax commissioner in his efforts to ascertain the true value of all such property and . . . to see to the proper and fair valuation of property within their respective counties." W. Va. Code § 11-1A-29a. The county commissions meet annually to review property valuations made by the Tax Commissioner and assessors. *Id.* § 11-3-24.

As relevant here, the county commissioners are responsible for adjudicating tax payer challenges to the valuation of their property. *Id.*; *In re Tax Assessment Against Am. Bituminous Power Partners, LP*, 539 S.E.2d 757, 761 (W. Va. 2000) ("initial avenue for relief from an allegedly erroneous property valuation lies with the county commission"). To prevail, a taxpayer appearing before the commissions "must prove by clear and convincing evidence" that the assessment is erroneous. *In re Tax Assessment of Foster Found.'s Woodlands Ret. Cmty.*, 672 S.E.2d 150, 161-68 (W. Va. 2008) ("*Foster Foundation*").[7]

Second, the annual salary of county commissioners depends upon the total property valuation within a county. W. Va. Code §§ 7-7-3(b), 7-7-4(e). Specifically, by West Virginia statute, counties are assigned

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[7] The county commissions' decisions are appealable to the West Virginia circuit courts, but "'will not be set aside if there is substantial evidence to support them.'" *Am. Bituminous*, 539 S.E.2d at 761 n.6. The Supreme Court of Appeals will not reverse a circuit court's decision "when supported by substantial evidence unless plainly wrong." Pet. App. 13a (internal quotation marks and citations omitted); *accord Foster Found.*, 672 S.E.2d at 155; *id.* at 154 (reviewing "'underlying factual findings under a clearly erroneous standard'").

one of ten classifications based on the "valuation of property" within the county. *Id.* § 7-7-3(b). At one end of the range are Class I counties where the assessed value of all classes of property exceeds $2 billion, and at the other are Class X counties in which the assessed value of all classes of property is between $0 and $199,999,999. *Id.* By statute, a county's classification controls the salary of commissioners and other elected officials within the county. *Id.* § 7-7-4(e). For instance, a commissioner elected in a Class I county has an annual salary of $36,960, whereas a commissioner in a Class X county is paid $19,800. *Id.* § 7-7-4(e)(5).

Based on the valuations that are subject to this petition, Monroe County qualified as a Class VIII county for the period in question (valuation between $300 million and $399,999,999). *See* Pet. 26 & n.7. Because the valuation of all property in Monroe County increased by roughly $30 million during the tax year relevant here—with more than one-third of that increase attributable from the valuation of petitioners' properties—Monroe County moved from a Class IX county to a Class VIII county. *Id.* at 7, 25-26. This reclassification caused the salary of each Monroe County commissioner to increase by $660, from $24,420 to $25,080. *Id.* at 26; *see* Pet. App. 29a, 33a; *see also* W. Va. Code § 7-7-4(e)(5) (showing, for instance, that other one-class differences may increase or decrease commissioners' salaries by up to $5940).

REASONS FOR GRANTING THE PETITION

I. BY ALLOWING COMMISSIONERS TO ADJUDICATE PROCEEDINGS IN WHICH THEY HAVE A PECUNIARY INTEREST, THE DECISION BELOW CONFLICTS WITH HOLDINGS OF THIS COURT.

Review should be granted because the decision below approved a process whereby petitioners' challenges to their property tax valuations were decided by county commissioners who stood to benefit financially by rejecting petitioners' claims. The West Virginia Supreme Court of Appeals' decision conflicts with this Court's Due Process precedents.

1. Petitioners demonstrated to the court below that each county commissioner would personally receive an additional $660 by denying petitioners' claim that their property tax assessment was excessive. *See* Appellants' Br. 28-29; Pet. App. 29a, 33a.[8] That system plainly violates the requirements of due process.

As explained by this Court just last year, the Due Process Clause prohibits a tribunal from "ha[ving] 'a direct, personal, substantial pecuniary interest' in a case" pending before it. *Caperton*, 129 S. Ct. at 2259 (quoting *Tumey*, 273 U.S. at 523). In *Caperton*, this Court reiterated that the "Due Process Clause prohibits judges from deciding cases in which they

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[8] This same pecuniary interest is implicated in *every* property valuation challenge before West Virginia's county commissions because there is "a direct correlation" between the value of assessed property in a county and the salaries received by county commissioners in that county. W. Va. Code § 7-7-1(b); *see id.* §§ 7-7-3(b), 7-7-4(e)(4) (commissioners' salaries); Appellants' Br. 28.

would have a financial interest that would "tempt adjudicators to disregard neutrality." *Id.* at 2260.

Caperton underscored the continuing vitality of this Court's Due Process precedents in *Tumey* and *Gibson*. In *Tumey*, a mayor of a village also served as a judge. 273 U.S. at 515-17. He received a salary supplement for his judicial duties if he convicted those brought before him, getting a portion of the fines assessed in each case, including $12 in the case under review. *Id.* at 520, 523. This Court held that the judge's "direct pecuniary interest in the outcome" of the proceeding violated the Due Process Clause. *Id.* at 535. It did so even though it recognized that "[t]here are doubtless mayors who would not allow such a consideration as $12 costs in each case to affect their judgment in it." *Id.* at 532; *accord Caperton*, 129 S. Ct. at 2260.

Applying these objective standards, this Court held in *Gibson* that even an indirect or contingent pecuniary stake in the subject of litigation violates due process. *See* 411 U.S. at 579. There, an association of optometrists, whose membership was limited to independent practitioners, filed unprofessional conduct charges against non-independent optometrists. *Id.* at 567-68. The tribunal hearing the charges was comprised exclusively of independent optometrists. *Id.* at 567, 578. This Court held that the non-independent optometrists had their due process rights violated by having to defend the charges before the board. *Id.* at 578-79. The Court ruled that the due process rights of the non-independent optometrists were violated because the tribunal deciding the case "was composed solely of optometrists in private practice for their own account" and "success in the Board's efforts would possibly redound to the personal benefit of members of the board." *Id.* at 578.

The decision below violates these clear rules. Here, the pecuniary interests of the county commissioners are even more concrete than in *Gibson*. It is undisputed that the county commissioners earned a $660 salary increase as a direct result of their decision rejecting petitioners' property valuation challenge. This is precisely the type of "direct pecuniary interest" in the outcome of the proceedings that rendered the mayor's court system unconstitutional in *Tumey*.

2. The court below nevertheless swept aside petitioners' constitutional challenge. The court below did not dispute that the county commissioners stood to benefit financially and directly if they rejected petitioners' challenge. Instead, the court questioned whether "a pay increase of $660.00 would in fact constitute a substantial pecuniary interest prohibiting the County Commission from adjudicating this dispute." Pet. App. 33a (citing *Gibson*, 411 U.S. at 579).

First, the suggestion that a salary increase of $660 is not a "substantial pecuniary interest" is not supported by *Gibson* or any other precedents of this Court. As shown above, the pecuniary interest in *Gibson* was far more tenuous than the $660 that the commissioners received as a result of their decision here. Moreover, $660—*i.e.*, nearly a three percent raise in their annual salary—is far removed from the type of *de minimis* benefit that the *Tumey* court suggested would not offend the Due Process Clause. *See* 273 U.S. at 531 (due process is violated where a judge accrues a pecuniary benefit as a result of his or her decision "unless the [sums] . . . are so small that they may be properly ignored as within the maxim *de minimis non curat lex.*"). It cannot be described as "a minute, remote, trifling or insignificant interest."

Id. at 532. On the contrary, $660 is precisely the type of incentive that, although it might be resisted by some commissioners, "would offer a possible temptation to the average man as a judge." *Id.* ("There are doubtless mayors who would not allow a consideration as *$12* costs in each case to affect their judgment in it.") (emphasis added); *accord Caperton*, 129 S. Ct. at 2260.[9] The county commissioners' direct financial interest in the outcome of the valuation proceedings here presents a more "serious, objective risk of actual bias" than the indirect link between the financial contributions to the campaign of Justice Benjamin held unconstitutional in *Caperton*. 129 S. Ct. at 2265; *see id.* at 2268 (Roberts, C.J., dissenting) (calling due process cases involving a decision-maker's "'direct, personal, substantial pecuniary interest'" "relatively straightforward") (quoting *Tumey*); *id.* at 2273.

Second, and equally baseless, is the suggestion by the court below that it could avoid the due process challenge by ruling, in its view, that "the Assessor's valuation of Mountain America's residual property was not excessive." Pet. App. 33a. That ruling directly conflicts with this Court's holdings in *Ward*, 409 U.S. at 61-62, and *Tumey*, 273 U.S. at 535. In

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[9] Moreover, the difference in salary for a commissioner whose county moves from Class VI to Class V (or vice-versa) is $5940. W. Va. Code § 7-7-4(e)(5); *see, e.g., id.* ($4620 difference in salary between Classes IX and X, $2640 difference between Classes VIII and VII). Indeed, because it is the value of *all* property within a county that sets the commissioners' salaries, this pecuniary interest inevitably acts as a thumb on the scale in every single valuation before the commissions. While a single valuation challenge, unlike here, may not tip a county over the threshold from one classification to another, commissioners have an inherent interest in holding the line against tax payers' challenges to assessments across the board.

Tumey, this Court rejected the argument that "the evidence shows clearly that the defendant was guilty and that he was only fined . . . the minimum amount, and therefore that he can not complain of a lack of due process." *Id.* Chief Justice Taft explained, "[n]o matter what the evidence was . . . he had the right to have an impartial judge . . . and was entitled to halt the trial because of the disqualification of the judge." *Id.* Likewise, in *Ward*, the Court rejected the suggestion that "unfairness at the trial level can be corrected on appeal and trial *de novo*" because a litigant is "entitled to a neutral and detached judge in the first instance." 409 U.S. at 61, 62.

The same principles apply here. The West Virginia Supreme Court of Appeals' post-hoc conclusion that the county commission's valuation decision was proper does not insulate the commission's ruling from scrutiny under the Due Process Clause. Even *de novo* review is inadequate to remedy a due process violation. Here, however, the court below affirmed the valuation based upon a deferential standard of review that deferred to the decisionmaking of the tribunal alleged to labor under a direct conflict of financial interest. Pet. App. 13a, 36a, 40a, 59a; *see supra* at 7 n.7 (discussing applicable standards of review). Therefore, the West Virginia Supreme Court's contrary suggestion that it could resolve petitioners' challenge on independent state-law grounds cannot be squared with this Court's holdings.

II. THE COMMISSION'S RESPONSIBILITY FOR THE COUNTY'S FISCAL AFFAIRS CONFLICTS WITH ITS OBLIGATION TO ADJUDICATE TAX APPEALS IMPARTIALLY.

The petition also should be granted because the decision below holds that the Due Process Clause does not prohibit county commissions from adjudicating valuation challenges even though county commissioners have a conflicting interest as a result of their executive obligations for the county. That ruling also conflicts with this Court's cases under the Due Process Clause. *See, e.g., Ward*, 409 U.S. at 58-61; *Tumey*, 273 U.S. at 522, 532-34.

1. In this case, Petitioners showed that their due process rights also were violated because the county commission "has an inherent bias because its primary responsibility is the superintendence of its county's fiscal affairs." Pet. App. 25a. In rejecting this challenge, the court below reaffirmed two of its own recent decisions holding that Due Process does not constrain a county commission from deciding taxpayer challenges to property assessments. *Id.* at 27a-28a (following *Foster Found.*, 672 S.E.2d 160 & Syl. Pt. 6; *Bayer MaterialScience*, 672 S.E. 2d 174). *Foster Foundation* and *Bayer MaterialScience* conflict with this Court's holdings in *Ward* and *Tumey*.

In *Foster Foundation*, the West Virginia Supreme Court of Appeals rejected the due process challenge now presented here based on the following reasoning:

> When faced with cases questioning the impartiality of a hearing tribunal, the Supreme Court of the United States generally has found a hearing tribunal to be partial when there exists a direct pecuniary interest in the outcome of the

> litigation. *However, when no such pecuniary interest is present, the Supreme Court of the United States typically has found the tribunal to satisfy the requirements of due process.*

672 S.E.2d at 159-60 (internal citations omitted, emphasis added). That holding conflicts with this Court's decisions.

Last year, in *Caperton*, this Court expressly rejected this very same conclusion, holding that Due Process prohibits "[e]very procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required . . . or which might lead him not to hold the balance nice, clear and true [between the litigants] denies . . . due process of law." 129 S. Ct. at 2260 (quoting *Tumey*, 273 U.S. at 532).

Caperton followed *Ward*, in which this Court held that Due Process prohibited a mayor with broad executive powers from adjudicating cases in his dual role as a judge because "revenue produced from [the] . . . court provides a substantial portion of [the] municipality's funds," explaining that an arbiter's pecuniary interest "in the fees and costs [collected by the court] *d[oes] not define the limits of the [due process] principle.*" *Ward*, 409 U.S. at 59-60 (emphasis added). The Court explained that the "'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, *necessarily involves a lack of due process of law.*'" *Id.* at 60 (emphasis added) (quoting *Tumey*, 273 U.S. at 534); *see Tumey*, 273 U.S. at 521-22 (recognizing that funds collected by the mayor's court went to "village improvements and repairs"); *accord Caperton*, 129 S. Ct. at 2260.

These same principles apply directly to West Virginia's system whereby county commissions are required to serve two conflicting interest. In West Virginia, the county commissions are the executive body charged with superintendence of the fiscal affairs of the counties. As a result, their determination of challenges, which if accepted, would reduce the counties' tax base presents a significant temptation to err on the side of rejecting a challenge to a property tax assessment.

Property taxes make up the majority of the county governments' revenues both in rural counties, like the one at issue here, and in more populated and industrialized counties. For instance, in Kanawha County, the State's most populous county, property taxes for the 2009-2010 fiscal year accounted for $34,785,646 of the $56,506,489 of the projected revenue for the County's General Fund, or 61.5% of revenue. *Cf. Ward*, 409 U.S. at 58 (noting that "major part" of the village income, 35 to 50 percent of general revenues, was implicated in the unconstitutional mayor's court). Projected expenditures from the General Fund included those for general government (53.6%), public safety (29.9%), health & sanitation (3.5%), culture & recreation (8.8%), and capital projects (4.2%).[10] Similarly, in Monroe County, property taxes for the same period accounted for $1,141,748 of the $2,158,497 (52.9%) of the projected revenue for the County's General Fund. Projected expenditures from the General Fund similarly included general government (60.8%),

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[10] http://www.wvsao.gov/localgovernment/files/levy/county_09-10/Kanawha%20County%202009-2010.pdf.

public safety (38.1%), culture & recreation (0.2%), and social services (0.9%).[11]

As in *Ward* and *Tumey*, the collections overseen by West Virginia commissions in their adjudicative capacity are the lifeblood of the county's executive functions. *See* Pet. 24; *Caperton*, 129 S. Ct. at 2260 (discussing the "possible temptation[s]" of executives that fulfill these dual adjudicatory roles). Any relief that a county commission orders for a taxpayer challenging an assessment reduces the tax base of the county, and thus threatens the commissioners, as executives, to reduce county services.[12] In this light, any taxpayer who appears before the County Commission challenging the assessment of property subject to tax must persuade a decisionmaker who has a clear and unmistakable vested interest in rejecting the taxpayer's appeal. For a manufacturer operating in West Virginia, a decision by a county

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[11] http://www.wvsao.gov/localgovernment/files/levy/county_09-10/Monroe%20County%202009-2010.pdf.

[12] Indeed, in the county commission proceedings underlying the decision in *Bayer MaterialScience*, 672 S.E.2d 174, the commissioners explicitly fretted that relief in the tax payers' favor would make their primary executive roles more difficult. *See* Br. of Appellants, at 18-19, 24-25, *Bayer MaterialScience*, Nos. 33378 et al. (W. Va. May 16, 2008). For instance, the President of the County Commission candidly acknowledged: "'You are talking arguably [about a] $350,000.00 loss to the Board of Education [if the taxpayer prevailed].'" *Id.* at 19 (quoting hearing transcript); *id.* at 21 (quoting commissioner's comment that "'[t]hese decisions have a real impact on the tax base of this State and County'"). Similarly, although the hearings before the commission ostensibly are about whether the *valuation* of the property is well-supported, the commissioners frequently ask taxpayers for the exact amount of the reduction in tax revenue that would occur were the valuation decisions reversed. *See id.* at 25 n.15.

commission to reduce the corporation's relatively large tax burden necessarily has a correspondingly large detrimental effect on the county funds available to operate the county for the benefit of its citizens. Thus, as here, the inherent conflict is especially stark. Nonetheless, even for the residential taxpayers with the smallest tax burden, the county commissions may be tempted to avoid any detriment to their treasury and may have a considerable interest in creating precedent that would encourage a greater number of taxpayers to challenge their property valuations.

2 Having overlooked these governing rules in *Foster Foundation*, the West Virginia Supreme Court of Appeals rejected the due process challenge to the county commissions' dual roles because the challenger had not "*prove[n]* the . . . County Commissioners' partiality or that their dual role [in adjudicating the valuation dispute] was compromised by this alleged divided loyalty." 672 S.E.2d at 160 (emphasis added); *accord* Pet. App. 28a (denying due process challenge based on the holding in *Foster Foundation*); *Bayer MaterialScience*, 672 S.E.2d at 184-85 (same).

This "proof of bias" requirement applied by the West Virginia Supreme Court of Appeals conflicts with this Court's holdings. As reiterated in *Caperton*, "[t]he Due Process Clause has been implemented by *objective standards that do not require proof of actual bias*." 129 S. Ct. at 2263 (emphasis added) (collecting cases); *accord Ward*, 409 U.S. at 60 ("the test is whether the . . . situation is one 'which would offer a possible temptation to the average man as a judge'"); 409 U.S. at 60 (noting "presumption of bias" that applies when the test is met); *id.* at 61 (rejecting

argument that challenger must show "special prejudice in his specific case").[13]

3. The rejection of these principles by the court below also conflicts with the decisions of a number of federal courts of appeals, district courts and state courts of last resort.

In *Esso Standard Oil Co.* v. *Lopez-Freytes*, the First Circuit held that a fine imposed by an administrative board violated the Due Process Clause. 522 F.3d 136, 145-47 (1st Cir. 2008). The court of appeals explained that the board had a "structural bias" stemming from "the potential financial benefit to the [board's] budget as a result of an imposed fine." *Id.* at 146 (discussing *Ward*). Similarly, in *DePiero* v. *City of Macedonia*, the Sixth Circuit, applying *Ward*, held that a mayor's court system deprived plaintiffs contesting traffic charges of due process because the mayor was responsible for "prepar[ing] the city's budget" and was accountable for the "fiscal health of the municipality as its chief executive." 180 F.3d 770,

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[13] In *Foster Foundation*, the West Virginia Supreme Court of Appeals principally relied on this Court's decision in *Dugan* v. *Ohio*, 277 U.S. 61, 65 (1928), for the proposition that where "no . . . pecuniary interest is present" this Court "typically has found the tribunal" to satisfy due process." 672 S.E.2d at 160. But *Dugan* does not support that claim. The West Virginia court asserted that *Dugan* "rul[ed] that mayor serving as judge had relationship too remote with city finances to warrant presumption of bias in prohibition law cases over which he presided and imposed fines where mayor received fixed salary, did not receive additional compensation from fines he imposed as judge, and was not solely responsible for expenditure of town's revenue." *Id.* In fact, *Dugan* held that that no unconstitutional conflict of interest was present because—unlike *Ward*, *Tumey* and the present case—"[t]he mayor has *no executive*, and exercises *only judicial* duties." 277 U.S. at 63 (emphasis added).

782 (6th Cir. 1999). In *United Church of the Medical Center* v. *Medical Center Commission*, the Seventh Circuit held a system for adjudicating title reverter violated due process because of the state "Commission's dual status as judge and a party interested in the outcome of the proceedings." 689 F.2d 693, 700 (7th Cir. 1982). Applying *Ward* and *Berryhill*, the Seventh Circuit recognized that, notwithstanding the lack of personal benefit to commissioners, the system over which they presided was unconstitutional because property reverted to the commission without cost and "the proceeds redound to [its] coffers." *Id.* And, in *Meyer* v. *Niles Township*, a district court held that a panel of township supervisors that had "sole discretion to determine if an applicant is entitled to [aid to medically indigent] benefits, payment of which is derived from the funds of the township" resulted in a denial of due process because, "[a]s supervisors, the [panelists] ha[d] an interest in protecting township funds." 477 F. Supp. 357, 362 (N.D. Ill. 1979).

Likewise, in *Gore* v. *Emerson*, the Arkansas Supreme Court held that due process prohibited trial before a mayor, as judge of the city court, where the fines assessed were paid into city's general fund. 557 S.W.2d 880, 883-84 (Ark. 1977) (en banc). The court held that "[t]he fact that the mayor does not receive any fee or additional compensation because of a conviction is of no real significance." *Id.* at 883.[14]

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[14] Additionally, in *In re Ross*, 656 P.2d 832 (Nev. 1983), the Nevada Supreme Court held that attorneys were deprived of due process because they had to challenge disciplinary fines before a Board of Bar Governors which was compromised by its interest in "protect[ing] the financial integrity of the bar association" where the fines imposed would have comprised a substantial amount of the bar's total revenue. *Id.* at 836-38.

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Review should be granted because the decision of the West Virginia Supreme Court of Appeals upholding West Virginia's system for adjudicating property valuation disputes is incompatible with baseline requirements of due process. The decision below conflicts with the holdings in *Caperton*, *Gibson*, *Ward* and *Tumey*, and with the decisions of numerous lower courts that have followed this Court's binding precedents.

Amicus WVMA respectfully submits that this Court's immediate review is imperative.

CONCLUSION

For these reasons, and those stated by petitioners, the petition should be granted.

Respectfully submitted,

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